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EDITOR'S NOTE

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No. 86-246-CFH
Status: GRANTED

Title: George Sumner, Director, Nevada Department of
Prisons, et al., Petitioners
V.
Raymond Wallace Shuman

Docketed:
August 1, 1986

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Nielsen, Brooke A.

Counsel for respondent: Flannagan III, N. Patrick, Markoff, N.
Daniel

Entry	Date	Note	Proceedings and Orders
1	Aug 1 1986	G	Petition for writ of certiorari filed.
3	Sep 16 1986		Order extending time to file response to petition until October 15, 1986.
4	Oct 15 1986		DISTRIBUTED. October 31, 1986
5	Oct 27 1986	X	Brief of respondent Raymond W. Shuman in opposition filed.
6	Oct 27 1986	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Oct 29 1986		DISTRIBUTED. Oct. 31, 1986. (Motion of respondent for leave to proceed in forma pauperis).
8	Oct 30 1986	X	Reply brief of petitioners Sumner, Dir., NV DOP, et al. filed.
10	Nov 3 1986		REDISTRIBUTED. November 7, 1986
11	Nov 10 1986		Motion of respondent for leave to proceed in forma pauperis GRANTED.
12	Nov 10 1986		Petition GRANTED. *****
13	Nov 20 1986	G	Motion of respondent for appointment of counsel filed.
14	Dec 1 1986		DISTRIBUTED. Dec. 5, 1986. (Motion of respondent for appointment of counsel).
15	Dec 8 1986		Motion for appointment of counsel GRANTED and it is ordered that N. Patrick Flannagan, III, Esquire, of Reno Nevada, is appointed to serve as counsel for the respondent in this case.
16	Dec 24 1986		Order extending time to file brief of petitioner on the merits until January 17, 1987.
19	Jan 14 1987		Joint appendix filed.
20	Jan 14 1987		Brief of petitioners Sumner, Dir., NV DOP, et al. filed.
21	Jan 23 1987		Record filed.
22	Jan 23 1987		Certified copy of original record and proceedings, 7 volumes, received.
24	Feb 12 1987		Order extending time to file brief of respondent on the merits until February 21, 1987.
27	Feb 26 1987		Brief of respondent Raymond W. Shuman in opposition filed.
30	Feb 13 1987	G	Motion of Center for Constitutional Rights, et al. for leave to file a brief as amici curiae filed.
31	Feb 18 1987	G	Motion of Johnny Harris, et al. for leave to file a brief as amici curiae filed.
32	Mar 2 1987		Motion of Center for Constitutional Rights, et al. for leave to file a brief as amici curiae GRANTED.
33	Mar 2 1987		Motion of Johnny Harris, et al. for leave to file a

Entry	Date	Note	Proceedings and Orders
34	Feb 26 1987	D	brief as amici curiae GRANTED.
35	Mar 9 1987		Motion of respondent for divided argument filed.
36	Mar 11 1987		Motion of respondent for divided argument DENIED.
37	Mar 11 1987	G	SET FOR ARGUMENT. Monday, April 20, 1987. (2nd case).
38	Mar 23 1987		Motion of N. Patrick Flanagan, III, Esquire, to withdraw as counsel and to substitute M. Daniel Markoff, Esquire filed.
39	Mar 25 1987		Motion of N. Patrick Flanagan, III, Esquire, to withdraw as counsel and to substitute M. Daniel Markoff, Esquire GRANTED.
50	Mar 27 1987	D	CIRCULATED.
51	Mar 31 1987		Motion of Johnny Harris, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
52	Apr 6 1987		Response to motion of Harris, et al. to participate in oral argument by respondent filed.
53	Apr 6 1987		The out-of-time motion of Johnny Harris, et al. for leave to participate in oral argument as amici curiae and for divided argument is denied. The order, heretofore entered on December 8, 1986, appointing N. Patrick Flanagan, III, Esquire, is vacated and it is ordered that M. Daniel Markoff, Esquire, of Las Vegas, Nevada, is appointed to serve as counsel for the respondent in this case.
58	Apr 9 1987	X	Reply brief of petitioners Sumner, Dir., NV DOP, et al. filed.
60	Apr 20 1987		ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

86-246

Supreme Court, U.S.

FILED

AUG 1 1988

JOSEPH F. SPANIOLO, JR.
CLERK

No.

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Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE SUMNER, Director, Nevada Department of Prisons,
BRIAN McKAY, Attorney General of Nevada,
Petitioner,

v.

RAYMOND WALLACE SHUMAN,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

GEORGE SUMNER, Director,
Nevada Department of Prisons,
BRIAN McKAY, Attorney General of Nevada,
Petitioners,

v.

RAYMOND WALLACE SHUMAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

QUESTIONS PRESENTED

Whether a mandatory death sentence for a murder committed by a prisoner serving a life sentence without the possibility of parole violates the Eighth and Fourteenth Amendments of the United States Constitution.

LIST OF PARTIES

Petitioners, respondents-appellants/cross-appellees in the United States Court of Appeals for the Ninth Circuit, are George Sumner, Director of the Nevada Department of Prisons (substituted per F.R.C.P. 25(a) for Charles L. Wolff, Jr.,) and Brian McKay, Attorney General of the State of Nevada. Respondent, petitioner-appellee/cross-appellant in the Ninth Circuit, is Raymond Wallace Shuman, a prisoner incarcerated in the Nevada Department of Prisons. Petitioners are hereinafter referred to as the State as the real party in interest. Respondent is referred to as Shuman.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No.

GEORGE SUMNER, et al.,

Petitioners,

v.

RAYMOND WALLACE SHUMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

George Sumner, Director of the Nevada
Department of Prisons, and Brian McKay,
Attorney General of the State of Nevada
petition for a writ of certiorari to
review the judgment of the United States
Court of Appeals for the Ninth Circuit in
this case.

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit from which certiorari is sought was filed June 12, 1986, is reported at 791 F.2d 788 and is reprinted as Appendix A hereto.

The order of the United States District Court for the District of Nevada, entered August 18, 1983, is reported at 571 F.Supp. 213 and is printed as Appendix B, hereto.

JURISDICTION

Review is sought of the order of the Court of Appeals filed June 12, 1986. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Petitioners rely on the Eighth Amendment to the Constitution of the United States:

Excessive bail shall not be

required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Petitioners also rely on Section 1 of the Fourteenth Amendment to the Constitution of the United States:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioners further rely on Section 200.030(1)(b) of the Nevada Revised Statutes which provided in pertinent part:

1. Capital murder is murder which is perpetrated by:

. . . .

b. A person who is under sentence of life imprisonment without possibility of parole.

. . . .

5. Every person convicted of capital murder shall be punished by death.

Nev. Rev. Stat. § 200.030(1)(b) (1973) (repealed and replaced at 1977 Nev. Stat. ch. 585 § 1, at 1541). Petitioners also rely on Section 200.010 of the Nevada Revised Statutes. These sections of Nevada statutes are reprinted in full in Appendix C hereto.

STATEMENT OF THE CASE

In 1958, Raymond Wallace Shuman was convicted of the first degree murder of Vernon Stallard in Yerington, Nevada. Shuman was sentenced to life in prison without the possibility of parole. In 1973, while still serving his murder sentence, Shuman doused fellow inmate Ruben Bejarno with lighter fluid and ignited Bejarno. Bejarno died three days later from the burns which covered over ninety percent of his body. Thereafter,

in 1975, Shuman was convicted of capital murder and received a mandatory death sentence.

Shuman appealed his 1975 conviction and mandatory death sentence to the Nevada Supreme Court. The Nevada Supreme court affirmed his conviction, in an opinion dated May 17, 1978 which specifically upholds the constitutionality of the mandatory death sentence. Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978) (reprinted as Appendix D).

Respondent Shuman filed two petitions for writ of habeas corpus in the district court under 28 U.S.C. § 2254 in July 1978. These petitions challenged Shuman's 1958 and 1975 convictions for murder, respectively. The petitions were consolidated by the district court.

Following answer and additional briefing by both parties, the district court entered an order on March 29, 1982

denying relief as to certain grounds contained in the consolidated petitions, and providing for an evidentiary hearing and further briefing on other grounds.

An evidentiary hearing was held on July 8, 1983, in the district court. The evidence presented primarily concerned the admission of Shuman and his co-defendant's confessions at the 1958 trial.

Following this hearing, the district court order granting habeas relief was entered on August 18, 1983. See Appendix A. The district court ruled against Shuman on all grounds with the exception of the constitutionality of the mandatory death sentence which Shuman had received upon being convicted of capital murder in 1975. The district court held that the mandatory death sentence given to respondent Shuman violates the Eighth and Fourteenth Amendments of the United States Constitution.

Petitioners filed a timely appeal from the decision of the district court. Shuman filed a cross-appeal from the decision. Oral argument occurred on February 15, 1985, before a panel of three justices of the appellate court.

The opinion of the court of appeals, affirming the district court, was filed June 12, 1986. The appellate court held, inter alia, that the section of Nevada law applying a mandatory death sentence to a person who is convicted of murder committed while serving a sentence of life imprisonment without possibility of parole violated the Eighth and Fourteenth Amendments to the United States Constitution. Petitioners seek certiorari relief on this issue alone.

REASONS FOR GRANTING THE WRIT

A.

The Decision of the Ninth Circuit Court of Appeals is in Conflict with the Decision of the Nevada Supreme Court Regarding the Constitutionality of Shuman's Mandatory Death Sentence.

The Nevada Supreme Court in Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978), upheld the constitutionality of the mandatory death sentence given to Shuman. See Appendix D. The Ninth Circuit Court of Appeals has ruled to the contrary on this issue. See Appendix B. In accordance with the provisions of Supreme Court Rule 17.1(a), review on writ of certiorari is appropriate where a federal court of appeals has decided a federal issue in a manner conflicting with a decision of the highest state court.

B.

A Mandatory Death Sentence for Murder Committed by a Prisoner Serving a Sentence of Life Imprisonment Without Possibility of Parole does not Violate the Eighth and Fourteenth Amendments to the United States Constitution.

In Furman v. Georgia, 408 U.S. 238 (1972), this Court invalidated the death penalty statutes in all jurisdictions. In 1973, the Nevada Legislature, in response to the Furman decision, enacted a statute providing a mandatory death sentence for persons convicted of capital murder which was defined, inter alia, as, ". . . murder which is perpetrated by . . . a person who is under sentence of life imprisonment without possibility of parole." Nev. Rev. Stat. § 200.030(1) (1973) (repealed and replaced at 1977 Nev. Stat. ch. 585, § 1 at 1541) (hereinafter referred to as Section 200.030(1)(b)).

Since Furman, this Court has upheld state death penalty statutes providing for

a separate penalty phase of the trial wherein the trier of fact considers evidence in aggravation and mitigation. See Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). As discussed infra, however, this Court has reserved from its rulings against mandatory death penalties the case of a mandatory death sentence for a murder committed by a prisoner serving a life sentence.

In ruling on this issue it must be remembered that Section 200.030(1)(b) is presumed to be valid. Shuman has failed to overcome this presumption of validity. As this Court stated in Gregg v. Georgia, 428 U.S. 153 (1976), "[T]he requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts." Id. at 174 (Stewart, Powell, and Stevens, JJ.) (plurality opinion). The Court went on to

say that

in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 175 (emphasis added.) See also California v. Ramos, 463 U.S. 992, 999-1000 (1983); Clement v. Flashing, 457 U.S. 957, 973 (1982) (plurality opinion); Parham v. Hughes, 441 U.S. 347, 351 (1979) (plurality opinion); Flemming v. Nestor, 363 U.S. 603, 617 (1960); Spencer v. Texas, 385 U.S. 554, 569 (1967) (Stewart, J., concurring); Rummel v. Estelle, 445 U.S. 263, 285 (1980) (Stewart, J., concurring); Johnson v. Louisiana, 406 U.S. 356, 365-366 (1972) (Blackmun, J., concurring)

Justice Blackmun, in his dissent in

Furman v. Georgia, 408 U.S. 238 (1972), noted, "We should not allow our preferences as to the wisdom of legislative . . . action, or our distaste for such action, to guide our judicial decisions in cases such as these. The temptations to cross that policy line are very great." Furman v. Georgia, 408 U.S. at 411 (Blackmun, J., dissenting). Petitioners argue that the appellate court and district court below crossed that "policy line" described by Justice Blackmun in Furman, in misapplying the import of Eddings v. Oklahoma, 455 U.S. 104 (1982), and in finding that Section 200.030(1)(b) violated Shuman's Eighth and Fourteenth Amendment Rights. The question to be answered in the instant case is not whether mandatory death sentences are wise or whether the courts agree with the legislative action but, rather, the issue simply is whether or not Section

200.030(1)(b) is constitutional.

In striking down North Carolina's mandatory statute for all first degree murders, this Court in Woodson v. North Carolina, 428 U.S. 280 (1976), was careful to note, "This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender. See n. 25, infra." Id. at 287, n. 7 (Stewart, Powell, and Stevens, JJ.) (plurality opinion) (emphasis added). Footnote 25 of the Woodson opinion reiterated that, "We have no occasion in this case to examine the constitutionality of mandatory death sentence statutes applicable to prisoners serving life sentences." Id. at 292-293.

In Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), the Court struck down

Louisiana's statutes which provided a mandatory death penalty for certain categories of murder. In holding that the statute as a whole was not sufficiently narrow, the Court was careful to point out,

Only the third category of the Louisiana first degree murder statute, covering intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law. See Gregg v. Georgia, 428 U.S., at 186, 96 S.Ct., at 2931; Woodson v. North Carolina, 428 U.S., at 287 n. 7, 292-293 n. 25, 96 S.Ct., at 2983 n. 7, 2985 n. 25. Id. at 334 n. 9 (Stewart, Powell and Stevens, JJ.) (plurality opinion).

In striking down a mandatory death penalty for first degree murder of a police officer, the Court was careful once

again making it clear, "We reserve again the question whether or in what circumstances mandatory death sentence statutes may be constitutionally applied to prisoners serving life sentences"

Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 n. 5 (1977) (per curiam).

Therefore, each time the Court has addressed the subject of mandatory death penalty statutes, it has pointedly underscored the distinction between all other mandatory statutes and provisions such as Section 200.030(1)(b) which are narrowly limited to the special problem of murder by an inmate serving a life sentence without possibility of parole. In consistently reserving its judgment on statutes like Section 200.030(1)(b), the Court has reaffirmed the presumption of validity which applies to Nevada Statute.

So impressed with the unique position of this type of statute has the Court been

that it has referred to it in cases not even involving mandatory statutes. Striking down limitations on consideration of mitigating circumstances in Lockett v. Ohio, 438 U.S. 586 (1978), the Court has limited its holding with this significant language:

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . .

¹¹We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner--or escapee--under a life sentence is found guilty of murder. See Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 n. 5, 97 S.Ct. 1993, 1996, 52 L.Ed.2d 637 (1977).

Id. at 604 & n. 11 (emphasis added and

deleted; one footnote omitted). Nor have those opinions been the only ones to signal the constitutionality of statutes like Section 200.030 (1)(b). In Gregg v. Georgia, the Court noted that "there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate." Id. at 186 (Stewart, Powell and Stevens, JJ.) (plurality opinion) (footnote omitted). See also Furman v. Georgia, 408 U.S. 238, 307 (1972) (Stewart, J., concurring) (noting that a statute ordaining the death penalty for a life term prisoner who commits murder would leave only the question whether capital punishment is unconstitutional for all crimes and under all circumstances). The consistent repetition of this language imports more than merely leaving the question open. As the Eleventh Circuit has recently recognized, "[This language] implies that mandatory

death penalty statutes applied to an extremely narrow category of crimes defined in large part in terms of the offender's character or record may be constitutionally permissible."

Moore v. Balkcom, 716 F.2d 1511, 1523 n. 12 (11th Cir. 1983), citing Woodson v. North Carolina, 428 U.S. at 287 nn. 7-8, 292 n. 25. supra. Because this implication has been clearly enunciated in four separate Supreme Court opinions, a decision upholding Section 200.030(1)(b) is called for. This is particularly apparent when the presumption of validity and the heavy burden resting on one who would have a statute struck down are considered.

This statute, enacted by the elected representatives of the people of the State of Nevada, gives due consideration to the "character and record of the individual offender and the circumstances of the

particular offense. . . ." Woodson v. North Carolina, 428 U.S. at 304 (citations omitted). Shuman's character has been duly considered -- at least indirectly if not directly -- by the Nevada Legislature in enacting the statute. Shuman was an inmate who had already been convicted of a crime of such severity (murder) that he had been sentenced to life in prison without possibility of parole. Thus, it had already been judicially determined that his character and record were such that he should never be allowed to live in society again. Shuman then murdered a fellow human being without any justification or excuse. Shuman was then found guilty of this crime. These prerequisites to the imposition of the mandatory death sentence sufficiently define the character and record of Shuman.

The circumstances of the offense itself were duly considered by a jury of

twelve at Shuman's trial in 1975. Shuman had to be found guilty beyond a reasonable doubt of murder which was defined in Section 200.010 as the "unlawful killing of a human being with malice aforethought." See Appendix C. Shuman received a fair trial at which time he was afforded all his constitutional rights, including his right to instructions for lesser included offenses and defenses, and the opportunity to present evidence in his defense. Under these circumstances, the sentence of death has not been applied arbitrarily to Shuman.

It is significant that no one could be convicted of this very narrow capital offense unless he was already serving a sentence of life imprisonment without the possibility of parole at the time of the murder. That aspect of the offense itself establishes his character and record in every meaningful sense of those terms.

Not only has the murderer committed his latest crime of murder, but he has also been convicted of a separate and prior crime so serious that he was already serving a life sentence without possibility of parole.

As the Supreme Court noted in that most important footnote in its Woodson decision, a mandatory death penalty statute limited to murder by a prisoner serving a life sentence defines the crime "in large part in terms of the character or record of the offender." Woodson v. North Carolina, 428 U.S. at 287 n. 7 (1976) (Stewart, Powell, and Stevens, JJ.) (plurality opinion). The Court reiterated the same point in Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), where it said that a statute like Nevada's "defines the capital crime at least in significant part in terms of the character or record of the individual offender," id. at 334

n. 9 (Stewart, Powell, and Stevens, JJ.) (plurality opinion). There is nothing left to consider insofar as Shuman's record and character are involved, because it cannot be seriously contended that a life sentence inmate who commits a murder has a good character or good record.

Thus, the Fourteenth Amendment is not violated where the sentence of death has not been applied in an arbitrary or discriminatory fashion, but rather where the sentence has been applied after due consideration of the character and record of the accused, as well as the circumstance of the crime. Woodson v. North Carolina, 428 U.S. at 304 (citations omitted). This Court has ruled that the death penalty itself does not violate the Eighth Amendment. Under the circumstances of this case, only the certain prospect of the death penalty can achieve deterrence, ensure the safety of those who otherwise

would come into contact with Shuman, and do justice.

CONCLUSION

For the reasons stated above, petitioners respectfully request this Court to grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYMOND WALLACE SHUMAN,)	
)	
Petitioner-Appellee/)	Nos. 83-2392
Cross-Appellant.)	83-2459
)	
v.)	
)	
CHARLES L. WOLFF, JR.,)	D.C. Nos.
Director, Nevada State)	CV-R-78-118-ECR
Prison, et al.,)	CV-R-78-119-ECR
)	
Respondents-Appellants/)	
Cross-Appellees,)	<u>OPINION</u>
)	
)	

Appeal from the United States District
Court for the District of Nevada
Edward C. Reed, Jr.,
District Judge, Presiding
Argued and Submitted February 25, 1985
San Francisco, California

Before: DUNIWAY, HUG, and SKOPIL,
Circuit Judges.

HUG, Circuit Judge:

This appeal and cross-appeal concern the district court's rulings on a petition filed under 28 U.S.C. § 2254 pertaining to two convictions for murder. There are two principal issues. The first concerns the

validity of a 1958 conviction of murder that resulted in a sentence of life imprisonment without the possibility of parole. Shuman contends that the conviction was constitutionally infirm because a codefendant's confession was admitted in evidence and thus requires reversal under the Supreme Court's decision in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The district court upheld the conviction and Shuman appeals that ruling. The second issue concerns a conviction of murder in 1973. While serving his life sentence, Shuman was convicted in 1973 of the murder of a fellow inmate. The issue raised relating to this conviction is the constitutionality of the Nevada statute in effect in 1973 that provided for a mandatory death sentence for a conviction of murder perpetrated by a person who is under sentence of life imprisonment

without the possibility of parole. The district court held the statute unconstitutional and the State of Nevada appeals. We affirm both rulings of the district court.

I.

FACTS

In 1958, petitioner Shuman and a codefendant were convicted of first degree murder in the shooting death of a truck driver during a robbery on the roadside of a Nevada highway. The confessions of Shuman and the codefendant revealed that the codefendant shot the truck driver while Shuman remained in the car.

In 1958, the applicable criminal statute, Nev. Rev. Stat. § 200.030 (1957), provided that if the jury found a defendant guilty of murder in the first degree, the jury could fix the penalty at death or life imprisonment, with or without the possibility of parole. The jury, in

returning its verdict of guilty of first degree murder, designated the penalty of life imprisonment without the possibility of parole for both defendants.

In 1973, while serving his sentence of life imprisonment without the possibility of parole, Shuman was convicted of "capital murder" for the killing of a fellow prison inmate. The Nevada statute in effect at that time provided for three separate categories of murder: capital murder, murder in the first degree, and murder in the second degree. The mandatory penalty for capital murder was death. On appeal, the Nevada Supreme Court upheld the conviction and the death penalty, after evaluating Shuman's challenge to the constitutionality of the pertinent provisions of the mandatory death penalty statute. Shuman v. State of Nevada, 94 Nev. 265, 578 P.2d 1183 (1978).

On July 24, 1978, Shuman filed

petitions for habeas corpus and, by mid-1982, had exhausted his state remedies. The federal district court held an evidentiary hearing on the Bruton issue on July 8, 1983. At that hearing, the court clerk of the 1958 trial, Martha Barlow, brought to the court the physical evidence of that trial, much of which was introduced into evidence at the hearing through Mrs. Barlow, including Shuman's signed confession, tapes of the codefendant's confession, and Shuman's more detailed confession to the relevant 1958 murder and another murder committed in California a short time before. Although by 1983 Barlow had no independent recollection of what parts of the tapes had been played, with the help of notes she had written during the trial on transcripts of the tapes, she was able to identify those portions of the tapes that were played for the jury in 1958. Barlow also informed

the court of the unavailability of any trial transcript. One court reporter had destroyed his notes prior to 1966 and the other had retired sometime prior to 1978 and could not be located. The district court rejected the Bruton contention based on harmless error, but vacated the death sentence, finding it unconstitutional because it was mandatory.

II.

THE ALLEGED BRUTON ERROR

Shuman challenges the admission during his 1958 murder trial of the out-of-court confession of his codefendant Melvin Lee Rowland, which implicated Shuman. In Bruton v. United States, 391 U.S. 123, 137, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476 (1968), the Supreme Court held that introduction of such extrajudicial statements violates the defendant's right of confrontation secured by the confrontation clause of the sixth amendment and

that cautionary limiting instructions that the confession is evidence only against the confessing defendant, such as those given by the state trial court, do not remedy the deprivation of the right to confrontation. Bruton applies retroactively. Roberts v. Russell, 392 U.S. 293, 293, 88 S.Ct. 1921, 1921, 20 L.Ed.2d 1100 (1968). The district court concluded that the admission of Rowland's confession constituted Bruton error, but that the error was harmless beyond a reasonable doubt. The Supreme Court has held that a Bruton error is not reversible error if it can be shown that it was harmless beyond a reasonable doubt. Harrington v. California, 395 U.S. 250, 253-54, 89 S.Ct. 1726, 1728, 23 L.Ed.2d 284 (1969).

The district court was initially confronted with the problem that the trial transcripts no longer exist; however, the court clerk from the 1958 trial, Martha

Barlow, presented the court with exhibits considered by the jury, including a three-page signed confession of Shuman, three tapes of Shuman's two-day-long oral confession, and tapes of codefendant Rowland's confession. The clerk testified as to which parts of the tapes the jury heard based on contemporaneous notes she had made on the ninety-page transcript of the tapes.^{1/} The district court found that the confession,

even with the excisions made, furnishes a detailed and complete account of the murder of which petitioner was convicted at his 1958 trial. The confession of Marvin Lee Rowland, although not quite as detailed as petitioner's confession, and even with excisions made in it, also gives a complete account of the same murder. Both confessions as received in evidence are in agreement with one another and interlock. There are no material conflicts between the two as to any element of the murder. It is readily apparent from a reading of petitioner's confession that that confession alone provided more than a sufficient basis for

his conviction.

See Parker v. Randolph, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139, 60 L.Ed.2d 713 (1979) (error harmless where "the incriminated defendant has corroborated his codefendant's statement by heaping blame onto himself").

Shuman disputes the admissibility of Mrs. Barlow's testimony, arguing that Mrs. Barlow had no independent recollection of which portions of the taped confessions were played.^{2/} Her testimony was based largely upon the notes she had made during the trial on the transcripts of the tapes. Such evidence is admissible under Fed. R. Evid. 803(5) since Mrs. Barlow adequately testified to the three foundational elements: (1) that she had once had the knowledge but, by the time of the hearing, had insufficient recollection to enable her to testify fully and accurately, (2) that the notes were made when the matter

was fresh in her memory, and (3) that the notes correctly reflected that knowledge. Further, this objection to the admissibility of this evidence is inconsistent since Shuman must rely on Mrs. Barlow's notes to press his Bruton claim concerning the introduction of codefendant Rowland's confession.

We agree with the district court that the erroneous admission of Rowland's confession was harmless beyond a reasonable doubt under the standards of Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1968), and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

III.

THE MANDATORY DEATH PENALTY

We now turn to consideration of the State of Nevada's cross-appeal of the district court's holding that the statute under which Shuman was sentenced is

constitutionally infirm because of its mandatory nature. The applicable statute in effect at the time of Shuman's 1976 conviction, Nev. Rev. Stat. § 200.030 (1973), provided in pertinent part:

1. Capital murder is murder which is perpetrated by:

. . .

b. A person who is under sentence of life imprisonment without possibility of parole.

. . .

5. Every person convicted of capital murder shall be punished by death.³⁷

The Nevada Supreme Court in Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978), upheld the constitutionality of this mandatory death penalty provision even though it had earlier declared the mandatory death penalty provision of another subsection of Nev. Rev. Stat. § 200.030 to be in violation of the eighth and fourteenth amendments of the United States

Constitution.^{4/} The Nevada Supreme Court noted that although the constitutionality of mandatory death sentences had been generally rejected by the Supreme Court, the Court had specifically excepted from its holding and expressed no opinion on the application of a mandatory death sentence to a conviction of murder by a person serving a life sentence. Shuman v. State, 94 Nev. at 270-71, 578 P.2d at 1186-87.

The Nevada Supreme Court was quite correct that we are here dealing with the exact circumstance for which the Supreme Court specifically reserved judgment. The district court had, and this court has, the advantage of some additional decisions of the Supreme Court that shed light on the issue that were not available to the Nevada Supreme Court at the time of its decision. The district court, in a carefully reasoned decision, concluded

that the recent opinion of the Supreme Court in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), made apparent its disdain for the mandatory death penalty in general and that the reasons there expressed would apply as well in the circumstances of a murder committed by a person serving a life sentence.

A review of the evolving position of the United States Supreme Court with regard to the death penalty is instructive in making the determination in this case. In Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court rendered a 5-to-4 decision that, in effect, invalidated the death penalty statutes in all jurisdictions in the United States. In that case, there were nine separate opinions, with each justice expressing his specific reasons for concurring with or dissenting from a

brief per curiam opinion. For the majority, Justices Brennan and Marshall concluded that the eighth amendment prohibited the death penalty in all circumstances id. at 305, 370-71; Justices Douglas, Stewart, and White each had a somewhat different rationale, but basically objected to the arbitrary and discriminatory manner in which it was administered because of the wide discretion left to juries to impose or not to impose a death sentence. Justice Douglas left open the possibility that mandatory death penalties could be constitutional. Id. at 256-57, 309-10, 313-14.

The response from state legislatures took two approaches. Some limited the discretion of juries by prescribing guidelines that the jury or sentencing judge must consider in determining whether to fix the sentence at death or life imprisonment. The other approach was to

provide for mandatory death sentences for certain narrowly-defined crimes.

In 1976, the Court considered five death penalty cases in which it upheld the guideline approach and rejected the mandatory death sentence approach. The guideline approach was upheld in Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); and Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The mandatory sentencing approach was rejected in Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), each decided in a 5-to-4 decision. Again, Justices Brennan and Marshall concluded that the death penalty was unconstitutional per se. A three-judge plurality, composed of

Justices Stewart, Powell, and Stevens, concluded that the mandatory application of the penalty, without consideration of the individual offense and the character and record of the offender, rendered the statutes violative of the eighth and fourteenth amendments. Justices Burger, White, Blackmun, and Rehnquist dissented.

The plurality opinion in Woodson pointed out that, at the time the eighth amendment was adopted, the states uniformly followed the common law practice of mandatory death sentences for certain specific crimes, but that the harshness of the application of these penalties had resulted in reforms allowing more flexibility in providing for the discretion of the jury to impose or not to impose the death penalty. Woodson, 428 U.S. at 289-98, 96 S.Ct. at 2984-88. The opinion concluded that, because of the vast qualitative difference between a

sentence of death and one of imprisonment, there is greater need for reliability before imposing a death sentence and that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

Woodson, 428 U.S. at 304, 96 S.Ct. 2991 (citations omitted). The same plurality reemphasized this rationale in Roberts (Stanislaus), decided the same day. 428 U.S. at 333-36, 96 S.Ct. at 3006-3007.

In a subsequent opinion Roberts (Harry) v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977), the same five-judge majority struck down the mandatory death penalty and confirmed the rationale expressed in the Woodson and

Roberts (Stanislaus) decisions. Id. at 636-37, 97 S.Ct. at 1995-96. The same four justices dissented. In each of these cases, the controlling opinions had specifically indicated that no opinion was being expressed on the constitutionality of a mandatory sentence for a murder committed by a person serving a life sentence. Woodson, 428 U.S. at 287, n.7 and 292-3 n.25, 96 S.Ct. at 2983 n.7 and 2785 n.25; Roberts (Stanislaus), 428 U.S. at 334 n.9, 96 S.Ct. at 3006 n.9; Roberts (Harry), 428 U.S. at 637 n.5, 97 S.Ct. at 1995 n.5.

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Chief Justice Burger sought to extract the governing principles enumerated by the Court's various opinions for the guidance of the lower courts, stating:

In the last decade, many of the States have been obliged to revise their death penalty

statutes in response to the various opinions supporting the judgments in Furman and Gregg and its companion cases. The signals from this Court have not, however, always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance.

Id. at 602, 98 S.Ct. at 2963. The Court struck down a death penalty statute limiting the mitigating circumstances the sentencing judge could consider. Three justices concurred with the Chief Justice in the opinion (Justices Stewart, Powell, and Stevens). Justices White and Blackmun concurred in the judgment on a narrower ground; Justice Marshall again stressed his view that the death penalty was unconstitutional per se; Justice Rehnquist dissented; and Justice Brennan did not participate in the decision. The opinion of the Chief Justice stated:

We are now faced with those questions and we conclude that

the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,^{11/} not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.^{12/}

^{11/} We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner--or escapee--under a life sentence is found guilty of murder. See Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 n.5, [97 S.Ct. 1993, 1995 n.5, 52 L.Ed.2d 637] (1977).

^{12/} Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.

Id. at 604, 98 S.Ct. at 2964 (emphasis in original). As can be seen from note 11 in the above quotation, the Court still re-

served any expression of opinion on the question at issue in this case.

A more recent pronouncement of the Court bearing on the issue is Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In a 5-to-4 decision, the Court vacated a death sentence where the trial judge had believed he was constrained from considering the age and turbulent family background of the defendant and remanded for the state courts to consider "all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." Id. at 113-17, 102 S.Ct. at 876-78. The opinion of Justice Powell, in which Justices Brennan, Marshall, Stevens, and O'Connor concurred, relied on the standard stated in Lockett. The dissent written by Justice Burger and concurred in by Justices White, Blackmun, and Rehnquist, agreed that Lockett provided the

appropriate standard but disagreed with its application in this case. Id. at 121-26, 102 S.Ct. at 880-83.

It is apparent that the standard set forth in Lockett is to be applied in death penalty cases. Justice Powell's opinion quoted the passage from Lockett previously quoted herein, but modified it in a way that is significant in this case. The opinion states:

In Lockett v. Ohio, 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973] (1978), CHIEF JUSTICE BURGER, writing for the plurality, stated the rule that we apply today:

[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Id. at 604 [98 S.Ct. at 2965] (emphasis in original).

Eddings, 455 U.S. at 110, 102 S.Ct. at 874 (footnote omitted). We note that the rule applied by Justice Powell eliminates the phrase, "in all but the rarest kind of capital case," and also eliminates any reference to footnote 11 of the Lockett opinion that reserves judgment on the situation of a murder committed by a person under a life sentence. The specific elimination of the phrase from the quotation gives some indication that the Court intended to eliminate the reservation concerning the person serving a life sentence as set forth in footnote 11 of the Lockett decision.

However, because that situation was not discussed in Eddings and the facts of the case did not present that situation, we will proceed to discuss the application of the Lockett standard to that area reserved by the footnotes in Woodson, Roberts (Stanislaus), Roberts (Harry), and

Lockett.^{5/} There appear to be two reasons why the opinions reserved judgment in this area. The first is that the character or record of a prisoner serving a life sentence is adequately evident from the fact he has been given a life sentence. This was the rationale stated in Woodson.^{6/} Under this rationale, it is unnecessary to consider mitigating circumstances because Shuman's bad character and record are adequately established from the fact he is serving a life sentence. With the evolution of the Supreme Court's view, as expressed in Lockett and Eddings, it seems readily apparent that this earlier rationale could not be applied consistent with those opinions.

The difficulties are evident in the application of the relevant Nevada statutes. At the time Shuman was convicted of the second murder in 1973, a person could have been serving a life sentence without

the possibility of parole for numerous offenses. At the time of his 1958 conviction, the applicable Nevada statute authorized a sentence of life imprisonment without the possibility of parole for the following offenses.

All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, or which shall be committed by a convict in the state prison serving a sentence of life imprisonment

Nev. Rev. Stat. § 200.030(1) (1957).

Thus, a sentence of life imprisonment without the possibility of parole could have resulted from conduct such as a killing by an accomplice in an attempted burglary or it could have resulted from conduct as aggravated as a torture murder. Furthermore, the consideration of other relevant circumstances would be

eliminated, such as the age and the mental or emotional state of the defendant, the provocation for the killing, the pressure from other inmates, and the record of the defendant in prison since the first offense.

It would appear that this reason for the reservation was dropped by the Court in Lockett because a different reason was there advanced. The expressed possible reason was the need to deter certain kinds of homicide.^{7/} However, the deterrent effect of capital punishment to the person serving a life sentence still exists under statutes that give individualized consideration to the nature of the offense and the circumstances of the offender, such as the statute in Gregg v. Georgia, 428 U.S. 153 (1976), and in the current Nevada statute, Nev. Rev. Stat. § 200.030-35.^{8/} The argument that the death penalty is a necessary deterrent to a person serving a

sentence of life imprisonment without the possibility of parole because another such sentence would constitute no deterrent is more logically concerned with the question of whether there should be a death penalty at all, rather than whether the penalty should be mandatory. See People v. Smith, 63 N.Y.2d 41, 479 N.Y.S.2d 706, 724, 468 N.E.2d 879, 897 (N.Y. 1984), cert. denied, ___U.S.___ 105 S. Ct. 1226, 84 L.Ed.2d 364 (1985). As the district court aptly noted, "the availability of the death penalty for the prisoner serving a life term without the possibility of parole is a sufficient deterrent, while making mandatory such a sentence under those circumstances only serves to give the imposition of the death sentence the air of arbitrariness and caprice."

We agree with analysis of the well-reasoned opinion of the Court of Appeals of New York in concluding under

similar, though distinguishable circumstances, that "a mandatory death statute simply cannot be reconciled with the scrupulous care the legal system demands to insure that the death penalty fits the individual and the crime." Smith, 468 N.E.2d at 897, 479 N.Y.S.2d at 724. Though the Supreme Court had earlier reserved its opinion concerning a person convicted of murder who was serving a life sentence, the reasons expressed in the opinions generally rejecting the mandatory death statutes are applicable as well in that circumstance. We suggest that this is the reason why that reservation was not restated in Eddings.

VI.

CONCLUSION

We conclude that the provision of the Nevada Revised Statutes providing for a mandatory death penalty for a person who is under the sentence of life imprisonment

without the possibility of parole, under which Shuman was sentenced in 1978, violated the eighth and fourteenth amendments to the United States Constitution. We therefore affirm the district court's grant of the petition for habeas corpus relief from the imposition of the death sentence.

We also affirm the denial of Shuman's petition for relief from the 1958 conviction. While it was Bruton error to admit the confession of codefendant Rowland, this error was harmless beyond a reasonable doubt in light of Shuman's own confession.

AFFIRMED.

Footnotes

- 1/ Portions of Shuman's confession relating to another murder in California were not played to the jury.
- 2/ Shuman's 1958 trial counsel had objected to admission of the Rowland confession, but a tactical decision was made not to take a direct appeal

because, according to a 1978 affidavit of the 1958 defense counsel, the 1958 trial was considered a victory. The death sentence had been avoided, and any retrial would again subject Shuman to a possible death sentence. According to counsel, Shuman also would have had to face another murder charge, and a possible death sentence in California, had he not been convicted for the 1958 Nevada slaying.

- 3/ The offenses included within the definition of capital murder were: (a) killing a peace officer or fireman while he was acting in his official capacity, (b) murder perpetrated by a person under sentence of life imprisonment without parole, (c) executing a contract to kill, (d) use or detonation of a bomb or explosive device, (3) killing more than one person willfully as the result of a single plan, scheme, or device. Nev. Rev. Stat. § 200.030(1)(a)-(e) (1973).

- 4/ The Nevada Supreme Court in Smith v. State, 93 Nev. 82, 560 P.2d 158 (1977) held unconstitutional the mandatory death penalty prescribed in Nev. Rev. Stat. § 200.030(5) as it applied to Nev. Rev. Stat. § 200.030(1)(e), (the killing of more than one person as the result of a single plan, scheme, or device), based on the United States Supreme Court's decisions in Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts (Stanislaus v. Louisiana), 428 U.S. 325 (1976).

The portion of Nev. Rev. Stat. §

200.030, which provided for "capital murder" and mandated the death penalty for conviction of that offense, has since been repealed. The present statute provides that a person convicted of first degree murder shall be punished by death "only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances." Nev. Rev. Stat. § 200.030(4)(a) (enacted in 1977). The only aggravating circumstances to be considered are set forth in Nev. Rev. Stat. § 200.033 and a non-exclusive list of mitigating circumstances are set forth in Nev. Rev. Stat. § 200.035.

- 5/ In Supreme Court cases dealing with similar capital punishment issues since Eddings, none have concerned the specific issue here involved, but it is evident that the continuing emphasis is on individualized consideration of the offender and his crime. In none of these cases that quoted the standards of Lockett and Woodson has there been any reference to a reservation of opinion concerning a murder committed by a person serving a life sentence. See Skipper v. South Carolina, No. 84-6859 (U.S. April 29, 1986); Baldwin v. Alabama, U.S. , 105 S. Ct. 2727, 86 L.Ed.2d 300 (1985); California v. Ramos, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983); Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); Zant v. Stephens, 462 U.S.

862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

6/ The Woodson reservation provides:

This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender. We thus express no opinion regarding the constitutionality of such a statute.

Woodson, 428 U.S. at 387 n.7, 96 S.Ct. at 2983 n.6.

7/ The opinion of the Court stated:

We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner--or escapee--under a life sentence is found guilty of murder. See Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 n.5, [97 S.Ct. 1993, 1995 n.5] (1977).

Lockett, 438 at 604 n.11, 98 S.Ct. 2964 n.11.

8/ See note 4, supra.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

RAYMOND WALLACE SHUMAN,

Case Nos.
CV-R-78-118-ECR
CV-R-78-119-ECR

Petitioner,

vs.

ORDER

CHARLES L. WOLFF, JR.,
et al.,

Respondents.
_____ /

Pursuant to the Court's order entered herein on March 23, 1983, and the subsequent evidentiary hearing held on July 8, 1983, the Court now renders its ruling on the remaining claims in this action.

With regard to petitioner's conviction for first degree murder in 1958, it is asserted that the confession of his codefendant was improperly admitted in violation of the rule of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), which is applied retroactively. Roberts v. Russell, 392

U.S. 293, 88 S.Ct. 1921, 20 L.Ed.2d 1100 (1968). The Court now further considers its earlier denial of this claim in its order of March 23, 1983.

A complete transcript of the petitioner's 1958 trial is not available for this Court to review.

However, a partial transcript of that trial is available, as are the Court Clerk's minutes and a list of exhibits admitted in behalf of the state. The record also includes transcribed copies of the confession of the petitioner and the confession of his former codefendant, Marvin Lee Rowland. The records available indicate that these confessions were both admitted at trial subject to court ordered excisions of certain portions thereof. The face of the petition also confirms the admission of the confessions of petitioner and his codefendant.

The petitioner's confession was given

by him on two consecutive days, December 20 and December 21 of 1957, at Hawthorne, Nevada. Transcribed, it totals some ninety pages and, even with the excisions made, furnishes a detailed and complete account of the murder of which petitioner was convicted at his 1958 trial. The confession of Marvin Lee Rowland, although not quite as detailed as petitioner's confession, and even with excisions made in it, also gives a complete account of the same murder. Both confessions as received in evidence are in agreement with one another and interlock. There are no material conflicts between the two as to any element of the murder. It is readily apparent from a reading of petitioner's confession that that confession alone provided more than a sufficient basis for his conviction.

Shortly after Bruton, supra, was decided, the Supreme Court rejected the

contention that the erroneous admission at a joint trial of evidence such as was introduced in the Bruton trial automatically requires reversal of an otherwise valid conviction. Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

It is important to remember that the confession at issue in Bruton inculcated a nonconfessing defendant. The Supreme Court explained the impact of Bruton on cases in which both or all defendants confess in Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). The Court stated:

"The prejudicial impact of a codefendant's confession upon an incriminated defendant who has, insofar as the jury is concerned, maintained his innocence from the beginning is simply too great in such cases to be cured by a limiting instruction. The same cannot be said, however, when the defendant's own confession - 'probably the most probative and damaging evidence that can be admitted against

him,' id., at 139 (White, J., dissenting) - is properly introduced at trial. The defendant is 'the most knowledgeable and unimpeachable source of information about his past conduct,' id., at 140 (White, J., dissenting), and one can scarcely imagine evidence more damaging to his defense than his own admission of guilt. Thus, the incrimination statements of a codefendant will seldom, if ever, be of the 'devastating' character referred to in Bruton when the incriminated defendant has admitted his own guilt." 442 U.S. at 72, 73.

The petitioner's statements and admissions which were introduced against him at the 1958 trial constituted a complete confession. They described all the elements of the crime with which he was charged and did so in considerable detail. They correlated with the circumstantial evidence and were damaging in the extreme. So damaging in fact that it is difficult, if not impossible, to conjecture that any statements made by petitioner's codefendant could have made any

difference in the outcome of the trial with regard to petitioner.

Although a complete record of the 1958 trial is lacking, it is apparent from reading petitioner's confession that a Bruton issue did not arise in favor of the defendant as a result of the introduction of the confession of Marvin Lee Rowland. Given the interlocking character of the confession of Mr. Rowland and petitioner's confession and the comprehensive and detailed nature of petitioner's confession it is clear beyond a reasonable doubt that the introduction of Mr. Rowland's confession constituted harmless error relative to petitioner.

Respondents argue that the absence of a complete transcript of the trial prejudices their ability to defend against the claim of Bruton error, i.e., to defend on the basis that even if such error may have occurred it was "harmless beyond a

reasonable doubt." United States v. EspericuetaReyes, 631 F.2d 616, 624 (9th Cir. 1980); Felton v. Harris, 482 F.Supp. 448, 456 (S.D.N.Y. 1979). Respondents contend that further consideration of possible Bruton error should be barred because of the prejudice resulting to respondents due to the nearly twenty-year delay in bringing this issue before the Court. This argument is well taken.

Under Rule 9(a) of the Rules Governing Section 2254 cases in the United States District Court, a § 2254 petition may be barred where the respondents can show that they have been prejudiced by the delay in their ability to respond "unless the petitioner shows that it is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred." At the evidentiary hearing held herein on July 8,

1983, it was shown that only a limited portion of the trial transcript is now available or can be obtained. This renders it virtually impossible for the respondents to show that any Bruton violation which may have occurred during the trial was "harmless beyond a reasonable doubt." If a complete record of the 1958 trial did exist, there is reason to believe that respondents could make a showing to support such a finding. It appears that, in addition to the defendant's own confession, very substantial evidence of the guilt of defendant independent of the codefendant's confessions was adduced at trial, but that no transcript of that evidence can now be obtained.

Under these circumstances, where the sole apparent motivation for the filing of a petition for habeas corpus challenging the 1958 conviction for first degree

murder is the subsequent conviction for first degree murder in 1975, the Court cannot find as a matter of law that petitioner has exercised due diligence in bringing this claim before the Court.

Petitioner has also presented several grounds in relation to the death penalty imposed after he was found guilty of first degree murder at the 1975 trial. First, petitioner contends that the statute under which he was sentenced was arbitrary in that it mandated the death penalty for persons who are serving prison terms of life without possibility of parole. He asserts that automatically sentencing such persons who commit murder to death is irrational and that no evidence exists to support its deterrent purpose.

Petitioner also urges that Nevada's appellate review of death penalty cases is constitutionally deficient under Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33

L.Ed.2d 346 (1972) and its progeny.

Finally, petitioner urges the Court to find that capital punishment by death in a gas chamber constitutes cruel and unusual punishment under the Eighth Amendment and that the death penalty per se is excessive.

Any reasonable reading of the cases following Furman v. Georgia, supra, especially Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) makes it clear that the Supreme Court does not consider the imposition of the death penalty to per se constitute a violation of the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments. Rather, beginning with Furman the Supreme Court has attempted to provide "standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused." Eddings v.

Oklahoma, 455 U.S. 104, 111, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982). The danger to be avoided is the substantial risk that the death penalty be imposed in an arbitrary and capricious fashion.

Following the Furman decision many states, including Nevada, enacted statutes making the death penalty mandatory for certain offenses as a response to the perceived fatal flaw in the Georgia statute held unconstitutional in Furman, that of conferring too much discretion in the sentencing authority. Beginning in 1976 the Supreme Court has held such mandatory statutes unconstitutional on several occasions because, as explained in the plurality opinion in Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976), the procedure used in imposing the penalty of death failed to consider the character and record of the individual offense together

with the circumstances of the particular offense. Washington v. Louisiana, 428 U.S. 906, 96 S.Ct. 3214, 49 L.Ed.2d 1213 (1976); Roberts H. v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977); Sparks v. North Carolina, 428 U.S. 905, 96 S.Ct. 3213, 49 L.Ed.2d 1212 (1976).

The question now before the Court, however, is one which the Supreme Court has expressly reserved in several cases. Roberts v. Louisiana, supra, 431 U.S. at 637 n.5; Woodson v. North Carolina, supra, 428 U.S. at p. 292-93 n. 25; Lockett v. Ohio, 438 U.S. 586, 602 n.11, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). That is whether a mandatory death penalty may be justified in the case of the prisoner serving a life sentence. As stated in the court's plurality opinion in Roberts H. v. Louisiana, supra, 428 U.S. 325, 334 n.9:

"Only the third category of the Louisiana first-degree murder statute, covering

intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence present a unique problem that may justify such a law."

In Eddings v. Oklahoma, supra, the Supreme Court for the first time since the confusion following that body's brief, cursory per curiam order in Furman presented an opinion joined by a majority of the court. There the following rule first presented in Lockett v. Ohio, supra, 438 U.S. at 604 was embraced:

"[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 455 U.S. at 110. (Emphasis in original.)

Application of this rule to petitioner's penalty of death imposed in 1975 necessitates vacating his death sentence since it was imposed under Nevada's since abandoned mandatory death penalty statute. In 1977 Nevada enacted legislation which in essence adopts the commonly used bifurcated procedure in death penalty whereby the guilt and punishment phases of the case are separated and evidence regarding both aggravating and mitigating circumstances can be presented for consideration by the sentencing authorities. NRS 175.552, 175.558.

The lack of any other reasonable means of deterring a prisoner who is serving a sentence of life without possibility of parole for murder from killing again is the primary basis offered in support of the constitutionality of petitioner's mandatory death sentence. It is the view of this Court that a mandatory

death sentence for the prisoner serving a life term who kills is not necessarily the only way to deter such a person from killing again. That is, imposition of the death penalty on a person in the position of petitioner pursuant to the bifurcated procedure currently in effect in Nevada, for instance, still allows the death penalty to be given in an appropriate case while also providing for the prisoner-defendant to present possible mitigating factors.

This presupposes, of course, that mitigating factors may be present in the case of the life term prisoner who stands convicted of first degree murder. As to defendants in general facing the death penalty and as recognized in Richmond v. Cardwell, 450 F.Supp. 519 (D.Ariz. 1978):

"The United States Supreme Court has repeatedly suggested those factors which focus on the characteristics of the person who committed the crime and

which should be considered in mitigation before imposition of the death penalty. Included are such factors as "Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime)." 450 F.Supp. at 523.

The fact that the prisoner-defendant has been previously convicted of murder and is serving a life term at the time of the second conviction is but one, albeit strong and important, aggravating factor which should be considered in passing sentence. Yet another mitigating factor which may be considered in this regard is "whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand." Granviel v. Estelle, 655 F.2d

673, 675 (5th Cir. 1981) quoting from Jurek v. State, 522 S.W.2d 934, 939-40, aff'd Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

Imposing mandatory capital punishment for the life term prisoner who intentionally kills is to consider but one aspect of the character and record of the individual while ignoring totally the circumstances of the crime for which he is being sentenced. The availability of the death penalty for the prisoner serving a life term without possibility of parole is a sufficient deterrent, while making mandatory such a sentence under those circumstances only serves to give the imposition of the death sentence the air of arbitrariness and caprice.

The Supreme Court's disdain for mandatory capital punishment was made clear by the majority opinion in Eddings v. Oklahoma, supra, 455 U.S. at 111-112,

where, drawing upon its less unified precedents the court found:

Similarly, in Woodson v. North Carolina, 428 U.S. 280 (1976), the plurality held that mandatory death sentencing was not a permissible response to the problem of arbitrary jury discretion. As the history of capital punishment had shown, such an approach to the problem of discretion could not succeed while the Eighth Amendment required that the individual be given his due: "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offenses as a constitutionally indispensable part of the process of inflicting the penalty of death." Id., at 304. See Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976).

In again drawing from its earlier death penalty cases the court in Eddings affirms the underlying insistence that "capital punishment be imposed fairly, and with reasonable consistency, or not at all." 455 U.S. at 112. A rule which provides

mandatory capital punishment for one class of persons but requires individualized consideration of circumstances before deciding whether or not to impose capital punishment in the cases of all others does not constitute reasonable consistency.

The Court concludes that NRS 200.030(1)(b) in effect at the time petitioner was convicted of first degree murder and subsequently sentenced to death in 1975 violates the Eighth and Fourteenth Amendments of the United States Constitution.

IT IS HEREBY ORDERED that the sentence of Raymond Wallace Shuman, in Case No. 33,259, State of Nevada v. Raymond Wallace Shuman, in the First Judicial District Court of the State of Nevada, in and for Carson City, be, and the same is hereby, vacated and set aside.

IT IS FURTHER ORDERED that said Raymond Wallace Shuman be discharged and

released from confinement on account of the sentence pronounced in said Case No. 33,259 unless the State, within one hundred twenty (120) days from the date of this Order initiates and completes lawful resentencing proceedings in accordance with this Order.

DATED: August 17, 1983.

/s/ Edward C. Reed
United States District Judge

APPENDIX C

NEVADA REVISED STATUTES

Section 200.010:

Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be affected by any of the various means by which death may be occasioned. (1983, Statutes of Nevada, ch. 218, § 6, at p. 512)

Section 200.030:

1. Capital murder is murder which is perpetrated by:

(a) Killing a peace officer or fireman:

(1) While such officer or fireman is acting in his official capacity or by reason of an act performed in his official capacity; and

(2) With knowledge that the victim is or was a peace officer or fireman.

For purposes of this paragraph "peace officer" means sheriffs of counties and their deputies, marshals and policemen of cities and towns, the chief and agents of the investigation and narcotics division of the department of law enforcement assistance, personnel of the Nevada highway patrol when exercising the police powers specified in NRS 418.150 and 481.180, and exercising the police powers specified in NRS 481.150 and 481.180, and the warden, deputy warden, correctional officers and other employees of the Nevada state prison when carrying out any duties prescribed by the warden of the Nevada state prison.

(b) A person who is under sentence of life imprisonment without possibility of parole.

(c) Executing a contract to kill.

For purposes of this paragraph "contract to kill" means an agreement, with or

without consideration, whereby one or more of the parties to the agreement commits murder. All parties to a contract to kill are guilty as principals.

(d) Use or detonation of a bomb or explosive device.

(e) Killing more than one person as the result of a common plan, scheme or design.

2. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing;

(b) Committed in the perpetration or attempted perpetration of rape, kidnaping, arson, robbery, burglary or sexual molestation of a child under the age of 14 years; or

(c) Committed to avoid or prevent the lawful arrest of any person by a peace

officer or to effect the escape of any person from legal custody. As used in this subsection, sexual molestation is any willful and lewd or lascivious act, other than acts constituting the crime of rape, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or of the child.

3. Murder of the second degree is all other kinds of murder.

4. The jury before whom any person indicted for murder is tried shall, if they find such person guilty thereof, designate by their verdict whether such person is guilty of capital murder or murder of the first or second degree.

5. Every person convicted of capital murder shall be punished by death. (1973,

Statutes of Nevada, ch. 798 § 5, at pp.
1803-1804)

APPENDIX D

RAYMOND WALLACE SHUMAN, Appellant, v. THE
STATE OF NEVADA, Respondent.

No. 8341

May 17, 1978

578 P.2d 1183

Appeal from judgment of conviction of
crime of capital murder entered by jury
verdict of guilty, and from mandatory
sentence of death; First Judicial District
Court, Carson City; Frank B. Gregory,
Judge.

Defendant appealed, and the Supreme
Court, Mowbray, J., held that: (1) state-
ments made by defendant's victim were
properly admitted as dying declarations;
(2) the statute, in effect at the time of
the murder, which made the death penalty
mandatory in the case of murder committed
by a prisoner serving a life sentence
without possibility of parole was consti-
tutional; (3) where defendant's status as
a prisoner was known to the jury, the fact

that defendant wore his prison garb during his trial was not prejudicial; (4) defendant was not denied effective assistance of counsel, and (5) the evidence was sufficient to support the conviction.

Affirmed.

[Rehearing denied June 19, 1978]

Rodlin Goff, State Public Defender, and Michael R. Griffin and J. Thomas Susich; Deputy Public Defenders, Carson City; and Raymond Wallace Shuman, in pro. per., for Appellant.

Robert List, Attorney General, and D. G. Menchetti, Deputy Attorney General, Carson City; Michael E. Fondi, District Attorney, Carson City, for Respondent.

OPINION

By the Court, MOWBRAY, J.:

A jury found appellant, Raymond Wallace Shuman, guilty of capital murder. Shuman, who was serving a life sentence without possibility of parole, was charged

with the fatal killing of a fellow prisoner. Under the provisions of a mandatory death sentence then in effect, Shuman was sentenced to death. NRS 200.030 (1973) (amended 1975, 1977).¹ He has appealed, asserting numerous assignments of error, which we reject as meritless; therefore, we affirm.

I.

THE FACTS

On August 27, 1973, Ruben Bejarno, an inmate at the Nevada State Prison, was set afire and burned with a flammable fluid. He was given emergency treatment at Carson-Tahoe Hospital in Carson City and transferred to Valley Medical Center in Santa Clara, California. He died three days later.

When he was transferred from the prison to the hospital, he said several times in the presence of an officer,

"[a]ll over a window." Bejarno stated at the hospital that it was Shuman who had set him afire. He reiterated this statement, upon questioning, at the medical center.

Shuman and Bejarno occupied adjoining cells. Two cans containing flammable fluid, both with Shuman's fingerprints, were found in Bejarno's cell. When Bejarno ran from his cell in flames, Shuman was seen near Bejarno's cell making throwing motions. The State's contention was that Shuman threw the empty cans into Bejarno's cell after he had set him afire. Shuman's hair was singed; he suffered a severe burn on his left hand. It was also learned that the two had been fighting, just prior to the incident, over opening a window located near their cells.

II.

ISSUES RAISED BY COUNSEL

Shuman, through his counsel, urges

reversal on the grounds (1) that the trial court erred in admitting the dying declarations of the deceased and (2) that imposition of the death penalty constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution [sic] and article 1, section 6, of the Nevada Constitution.

A. The Dying Declarations.

1. Bejarno suffered third-degree burns over ninety percent of his body, second-degree burns over nine percent of his body, and first-degree burns over one percent of his body. The record establishes that a person sustaining burns of this magnitude has no chance of survival.

A correctional officer at the prison who accompanied Bejarno to the hospital emergency room testified that Bejarno was burned very badly, was charred in many places, had blood oozing from his legs and

ankles, and had great difficulty in breathing. Predicated on these observations, the trial court permitted, over objection, the officer to testify that Bejarno stated repeatedly, "[a]ll over a window."

In *State v. Teeter*, 65 Nev. 584, 200 P.2d 657 (1948), this court ruled that a lay person is competent to testify when an injured person is conscious of impending death, providing the witness observed the injured person, his symptoms and expressions, and the declarant's general physical condition. Teeter supports the trial court's ruling in admitting Bejarno's statement, "[a]ll over a window," made repeatedly while en route to the hospital emergency room.

Shuman suggests, however, that, even so, the statements should not have been received, because they did not include any relevant facts surrounding the actual

burning; that they were only the opinion of the declarant relating to the reason for the assault. Prior to the adoption of NRS 51.335² in 1971, Nevada did not admit as dying declarations, expressions of opinion. The authorities were split regarding what amounted to a statement of fact relating to an injurious act and what was only an opinion. Wigmore, however, had long noted that the fact/opinion distinction was unsound and should be abolished. See cases collected at 5 J. Wigmore, Evidence § 1434, at 282-83 (1974). The federal rule does away with this distinction and permits dying declarations to include both the cause and the circumstances surrounding the declarant's death. See 11 Moore's Federal Practice § 804.01[11], at VIII-228 to -229 (1976). NRS 51.335, taken from example 3 of proposed federal rule 804, is broader than the rule as finally enacted by Congress.

We therefore conclude that our statute, NRS 51.335, dispenses with the fact/opinion distinction and that the decedent's statement were properly received.

2. Bejarno, at Carson-Tahoe Hospital, identified Shuman as his assailant. Shuman claims the testimony of the identification was inadmissible because Bejarno was not told at that time that his injuries were fatal. One of the attending physicians did, however, testify that he advised Bejarno that he had small chance of survival.

Bejarno's other dying declaration was made at Valley Medical Center two days prior to his death. Bejarno's voice was inaudible. He responded to questions, however, by nodding his head either affirmatively or negatively. The questioning, by a county investigator, shows that Bejarno was in full possession of his mental faculties. He identified Shuman as

his assailant. The extremity of Bejarno's situation was obvious. He was wrapped in gauze from head to foot, immobilized in a special bed, and could not control his shaking.

In Teeter, this court said:

[I]t is not necessary for the declarant to state to anyone, expressly, that he knows or believes he is going to die, or that death is certain or near, or to indulge in any like expression; nor is it deemed essential that his physician, or anyone else, state to the injured person that he will probably die as a result of his wounds, or that they employ any similar expression. It is sufficient if the wounds are of such a nature that the usual or probable effect upon the average person so injured would be mortal; and that such probable mortal effect is not hidden, but, from experience in like cases, it may be reasonably concluded that such probable effect has revealed itself upon the human consciousness of the wounded person. . . .

Id., 65 at 628, 200 P.2d at 679 (emphasis added).

We believe that the probable effect

of Bejarno's burns was sufficiently revealed to him and that he knew or strongly believed that his death was imminent. As Professor Wigmore observed: "The circumstances of each case will show whether the requisite consciousness existed; and it is poor policy to disturb the rulings of the trial judge upon the meaning of these circumstances." 5 J. Wigmore, Evidence § 1442 at 298-301 (1974). Therefore, we conclude that the dying declarations were properly received.

B. The Mandatory Death Sentence.

It is clear that the imposition of the death penalty does not, in itself, violate the eighth amendment ban on cruel and unusual punishment. *Gregg v. Georgia*, 428 U.S. 153 (1976). Nor does it violate the similar provision of the Nevada Constitution. *Hinrichs v. First Judicial Dist. Court*, 71 Nev. 168, 283 P.2d 614 (1955). The question presented by this

case is whether such a sentence may constitutionally be imposed upon one already serving a life sentence without possibility of parole, upon his conviction of the murder of his fellow inmate, under a statute which made the imposition of the death penalty mandatory under such circumstances.

In 1976 the United States Supreme Court, in *Gregg v. Georgia*, supra, and companion Florida and Texas cases,³ determined that the Georgia, Florida, and Texas death penalties were not in violation of the eighth amendment ban on cruel and unusual punishment, and were not arbitrary and capricious, where the statutes made provision for a bifurcated hearing, first as to guilt and then as to punishment, and where the tribunals, either judge or jury, were required to consider both aggravating and mitigating circumstances. The Court also determined,

however, that mandatory death penalty provisions of the statutes of North Carolina and Louisiana were invalid, because the jury had no opportunity to consider the circumstances of the crimes or the background of the accused. Woodson v. North Carolina, 428 U.S. 280 (1976); S. Roberts v. Louisiana, 428 U.S. 325 (1976). In Woodson, Justices Stewart, Powell, and Stevens observed that, although individual sentencing determinations generally reflected simply enlightened policy, rather than a constitutional imperative, in capital cases the fundamental respect for humanity underlying the eighth amendment required consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. 428 U.S. at 304. Woodson v. North Carolina and S. Roberts

v. Louisiana were both cited by the Court one year later, as the Court ruled unconstitutional the mandatory imposition of the death sentence under a statute requiring the death penalty for the killing of a police officer engaged in the performance of his duties, without consideration of the character or background of the accused. H. Roberts v. Louisiana, 431 U.S. 633 (1977).

In each of the cases in which it has ruled the mandatory imposition of the death penalty unconstitutional, however, the Court has specifically excepted from its prohibition the circumstances presented by the case at hand. Woodson v. North Carolina, 428 U.S. at 287, n. 7; S. Roberts v. Louisiana, 428 U.S. at 334, n. 9; H. Roberts v. Louisiana, 431 U.S. at 637, n. 5. The Court noted in S. Roberts v. Louisiana that a unique problem is presented:

Only the third category of the Louisiana first-degree murder statute, covering intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law. [Citations omitted.]

428 U.S. at 334, n. 9.

Although the Court does not explain the "unique" problem, we believe it is clear. Unlike all other situations, in which the question presented to the jury is the degree or nature of punishment that should be imposed, the question presented in this instance, if a separate hearing were required, would be whether any effective punishment should be imposed at all upon a prisoner already serving a life sentence without possibility of parole.

What "mitigating circumstances" could be offered that would justify the result that an individual convicted of murder would suffer no practical legal consequences for that deliberate act? It is this circumstance that makes the case "unique."

We note that this would also be the result if, as Shuman urges, we were to declare the statute under which he was sentenced unconstitutional. We do not see "fundamental respect for humanity", *Woodson v. North Carolina*, 428 U.S. at 304, reflected in the conclusion that the murder of Bejarno should be without effective legal consequences for its perpetrator. In the absence of a clear directive from the United States Supreme Court, we decline to reach such a result.

Therefore, we hold that NRS 200.030 (1) (b), as it was in effect when Shuman murdered Bejarno, did not offend the provisions of the United States or the

Nevada Contitutions [sic] against cruel and unusual punishment, and therefore was constitutional.

III.

ISSUES RAISED BY SHUMAN

Shuman requested and received permission to file in proper person supplemental briefs, in which he raised the remaining issues upon which he seeks reversal.

A. The Effect of Prison Clothes Worn at Trial.

Shuman wore his prison garb during his trial. He claims that as a result he was prejudiced in his right to a presumption of innocence. He was not prejudiced, for his status as a prisoner was known to the jury. As the court said in *United States ex rel. Stahl v. Hunderson*, 472 F.2d 556, 557 (5th Cir.), cert. denied, 411 U.S. 971 (1973), where the defendant, charged with killing a fellow inmate, was tried in prison clothes: "No prejudice

can result from seeing that which is already known." Quoted in *Estelle v. Williams*, 425 U.S. 501, 507 (1976).

B. The Discharge of Counsel's Duties.

Shuman contends he was denied his sixth amendment right to effective assistance of counsel. The standard by which such a claim may be tested is whether the effectiveness of counsel was such as to reduce the trial to a sham, a farce, or a pretense. *Bean v. State*, 86 Nev. 80, 465 P.2d 133, cert. denied, 400 U.S. 844 (1970). He asserts that his counsel failed to call witnesses who would have placed Shuman away from the scene of the crime and near a television set in another area when Bejarno was set on fire. (His counsel did present several witnesses who testified that Shuman was near the television set sometime before the fire.) There is a presumption that counsel

adequately discharged his duties, and that presumption can be overcome only by strong and convincing proof to the contrary.

Simthart v. State, 86 Nev. 925, 478 P.2d 576 (1970).

A reading of the record reveals that counsel properly discharged his duties. Such was the ruling of the trial judge in denying Shuman's motion to substitute counsel during his trial: "[I]t is my personal feeling that Mr. Aimar [Shuman's counsel] is doing an excellent job in protecting the rights of the defendant during the prosecution's case . . . Mr. Airmar is doing an excellent job and he is going to continue to do so." We agree.

C. Shuman's Guilt Beyond a Reasonable Doubt.

Shuman also complains that insufficient evidence was presented to the jury to support his conviction of capital murder. Since we have upheld the

admissibility of Bejarno's dying declarations, it would serve no purpose to specify the remaining evidence supporting the verdict. Suffice it to say that there is sufficient evidence in the record to support each and every material allegation of the crime and that in such a case the judgment of conviction may not be disturbed on appeal. Wills v. State, 93 Nev. 443, 566 P.2d 1138 (1977).

D. Shuman's Representation by Counsel at Prior Proceeding.

Finally, Shuman seeks reversal because, he claims, the record does not show that he was represented by counsel when he was convicted of the murder for which he is presently serving a sentence of life without possibility of parole, citing Burgett v. Texas, 389 U.S. 109 (1977).

Burgett is inapposite. There, documents admitted into evidence indicated

that the defendant was not represented by counsel. The court in Burgett said: "In this case the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding . . ." Id. at 114.

In the case at hand, no such presumption exists, as the evidence offered by the State was an abstract of judgment showing that Shuman was represented by counsel at the time of imposition of sentence. There was no suggestion that Shuman was not represented by counsel at every critical stage of the prior proceeding. Moreover, Shuman failed to object to this evidence at the time of its admission. This court has held repeatedly that failure to object at trial precludes raising the issue on appeal.

See, e.g., Allen v. State, 91 Nev. 78, 530 P.2d 1195 (1975).

Affirmed.⁴

BATJER, C. J., and THOMPSON and GUNDERSON, JJ., concur.

ZENOFF, C.J. (Retired), concurs:

When I assumed duties as a trial judge in 1958, my experience had been that of a lawyer with some criminal matters scattered in a general law practice. I felt then that the death penalty served a purpose. Now, many years later, I do not have the same opinion.

The purposes of imposing penalties upon convicted criminals are to punish, to rehabilitate, or to deter them and others from repeating the offenses in the future. It is questionable that the imposition of death for a capital crime does anything more than punish the criminal for the period of confinement until his life is taken away. The time waiting for execution may be punishing, but once the event takes place, for him it is all over.

As a worldly being he suffers no more. So too rehabilitation in a capital case serves no purpose. The murderer will either lose his life or his freedom; either is terminal so far as his living in a free society is concerned.

There might be a deterrence value, but if we only knew. Statistics that the death penalty does or does not discourage capital crime are not reliable. Public figures have been assassinated, their executioners put to death, yet assassinations still occur. Threat of the death penalty did not reduce airplane hijacking; in the long run strict security measures at airports accomplished the purpose. Murders are still committed in the few communities where executions have been carried out.

Public televising of executions might serve some deterring value; yet even supporters of the death penalty shudder at

the thought of watching an execution. Killing in exchange for killing does not provide the solution to capital crime.

Life imprisonment without possibility of parole should be our maximum penalty, but the words must mean what they say. Life without freedom is no life at all. Some prisoners prefer death to a life in prison, but to the contrary, of course, it can be argued that life in prison has not been significantly deterring either.

The fact remains that my oath of office requires that I uphold the laws of the State of Nevada as those laws have been defined by the Supreme Court of the United States. Shuman was sentenced to death under a statute that in some part was declared unconstitutional by the United States Supreme Court but not completely. See *Smith v. State*, 93 Nev. 82, 560 P.2d 158 (1977). In this case, he should have been afforded the bifurcated

penalty hearing; still, since Shuman testified at his trial, the jury knew all of the circumstances of the crime. If there was basis for mitigation, he would have gotten it. He does, therefore, fall within the unique situation of a prisoner serving life imprisonment without possibility of parole for one killing who has committed another.

Sentencing Shuman to the same penalty would be useless. Arguably he can be placed in solitary confinement for the rest of his life and deprived of any other prison privileges; but consider the incongruity of severe prison punishment being cruel and inhuman, but taking his life is not.

I do not believe capital punishment has a place in our cultured society, but I must reluctantly concur that the law is as stated in the majority opinion.

FOOTNOTES

¹ NRS 200.030 then read, in pertinent part: "1. Capital murder is murder which is perpetrated by: . . . (b) A person who is under sentence of life imprisonment without possibility of parole. . . . 5. Every person convicted of capital murder shall be punished by death." 1973 Nev.Stats., ch. 798, § 5, at 1803-04.

The current version of the statute, enacted by an Act of May 17, 1977 (1977 Nev. Stats., ch. 585, at 1541 et seq.), provides for a separate penalty hearing by the jury or, in some circumstances, a panel of three district judges. NRS 175.552-175.562, 177.055. The death penalty may be imposed in case of conviction of first-degree murder "only if one or more aggravating circumstances are found and any mitigating circumstances which are found did not outweigh the aggravating circumstance or circumstances." NRS 200.030, subsection 4(a). Murder "committed by a person under sentence of imprisonment" is listed as one of the circumstances by which murder of the first degree may be aggravated. NRS 200.033, subsection 1.

² NRS 51.335: "A statement made by a declarant while believing that his death was imminent is not inadmissible under the hearsay rule if the declarant is unavailable as a witness."

³ Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976).

⁴ The Chief Justice designated Hon. David Zenoff, Chief Justice (Retired), to

sit in this case. Nev. Const. art. 6, §
19.

OPPOSITION

BRIEF

EDITOR'S NOTE

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Supreme Court, U.S.
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JOSEPH P. SPANGL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-

GEORGE SUMNER, et al.,

Petitioners,

v.

RAYMOND WALLACE SHUMAN,

Respondent.

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-

GEORGE SUMNER, et al.,

Petitioners,

v.

RAYMOND WALLACE SHUMAN,

Respondent.

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1986

3 No. 86-

4
5 GEORGE SUMNER, et al.,

6 Petitioners,

7 v.

8 RAYMOND WALLACE SHUMAN,

9 Respondent.

10
11 BRIEF IN OPPOSITION TO THE PETITION FOR
12 WRIT OF CERTIORARI TO THE
13 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

14
15 RESPONDENT'S BRIEF IN OPPOSITION

16 Respondent hereby submits this Brief in opposition to
17 the Petition for Writ of Certiorari.

18
19 QUESTION PRESENTED

20 WHETHER A STATUTE WHICH MANDATES DEATH
21 TO ALL WHO COMMIT MURDER WHILE UNDER
22 SENTENCE OF LIFE IMPRISONMENT WITHOUT
23 POSSIBILITY OF PAROLE VIOLATES THE
24 EIGHTH AND FOURTEENTH AMENDMENTS TO THE
25 CONSTITUTION OF THE UNITED STATES.

26
27 JURISDICTION

28 Respondent has no objection to the jurisdiction of this
29 Court as stated by Petitioner.

30
31 CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

32 Respondent relies upon the Eighth and Fourteenth Amend-
ments to the United States Constitution but will further rely
upon Nevada Revised Statutes Sections 193.165; 194.020; 200.030

1 (1)(b)(1973); 200.030(4)(b); 200.320(1); 200.340(1); 200.366(2)
2 (a); 200.400(3); 200.410; 207.010, which provides in pertinent
3 part:

4 N.R.S. 193.165:

5 1. Any person who uses a firearm or other deadly
6 weapon ... in the commission of a crime shall be pun-
7 ished by imprisonment in the state prison for a term
8 equal to and in addition to the term of imprisonment
9 prescribed by statute for such crime. The sentence ...
shall run consecutively with the sentence prescribed.

10 N.R.S. 194.020:

11 The following persons ... are liable to punishment:

12 3. A person who, being out of state, counsels,
causes, procures, aids or abets another to commit a
crime in this state.

13 N.R.S. 200.030:

14 4. Every person convicted of murder of the first
15 degree shall be punished:
16 (a) By death, ...
17 (b) Otherwise, by imprisonment in the state
prison for life with or without possibil-
ity of parole.

18 N.R.S. 200.320:

19 Every person convicted of Kidnaping in the first
degree shall be punished:

20 1. Where the kidnaped person suffers substantial
21 bodily harm ... by imprisonment in the state prison for
22 life without the possibility of parole

23 N.R.S. 200.340:

24 1. Every person who shall aid and abet kidnaping
in the first degree shall be punished for kidnaping in
the first degree.

25 N.R.S. 200.366:

26 2. Any person who commits a sexual assault shall
27 be punished:
28 (a) If substantial bodily harm to the victim
results:
29 (1) By imprisonment in the state prison
for life, without the possibility
of parole;

30 ///

31 ///

1 N.R.S. 200.400:

2 3. Any person convicted of battery with intent
3 to kill, commit sexual assault, mayhem, robbery or
4 grand larceny ... if the crime results in serious bodily
5 harm to the victim, the person convicted shall be
6 punished by imprisonment in the state prison for life,
7 with or without the possibility of parole,

8 N.R.S. 200.410:

9 If a person fights ... a duel with [a deadly weapon],
10 and in doing so kills his antagonist ... every
11 such offender is guilty of murder in the first degree,
12 and upon conviction thereof shall be punished accordingly.

13 N.R.S. 207.010:

14 2. Every person convicted in this state of any
15 crime of which fraud or intent to defraud is an element,
16 or of petit larceny, or of any felony, who has previously
17 been three times convicted, whether in this state or
18 elsewhere ... shall be punished by imprisonment in the
19 state prison for life with or without possibility of
20 parole.

21 ARGUMENT

22 THE AUTOMATIC IMPOSITION OF THE DEATH PENALTY,
23 MANDATORILY IMPOSED BECAUSE OF AN ACCUSED'S
24 STATUS AND WITHOUT INDIVIDUAL CONSIDERATION OF
25 ANY ASPECT OF THE ACCUSED'S CHARACTER OR THE
26 CIRCUMSTANCES OF THE OFFENSE, VIOLATES THE
27 EIGHTH AND FOURTEENTH AMENDMENTS TO THE CON-
28 STITUTION OF THE UNITED STATES.

29 Petitioner has attempted to justify N.R.S. 200.030(1)(b)
30 by claiming that it is (1) presumed valid and (2) narrowly drawn
31 so as to preclude any consideration of any possible mitigating
32 factors. This attempt fails in several significant areas and
should be rejected. N.R.S. 200.030(1)(b) is unconstitutional.

33 A. THE PRESUMPTION OF VALIDITY HAS BEEN OVER-
34 COME BY RESPONDENT IN THIS CASE.

35 This Court has stated that, in assessing a punishment
36 selected by a state legislature, it will "presume" its validity

37 ///

1 so long as the penalty "is not cruelly inhumane or disproportion-
2 ate" to the crime involved. Gregg v. Georgia, 428 U.S. 153, 175
3 (1976). Petitioner's assertion that Respondent has not overcome
4 that presumption obviously ignores the lower courts' rulings.
5 The U. S. District Court, after extensive briefing and an eviden-
6 tiary hearing, concluded N.R.S. 200.030(1)(b) violated the Eighth
7 and Fourteenth Amendments of the United States Constitution be-
8 cause it failed to permit individualized consideration before
9 deciding whether or not to impose the death sentence. The Court
10 of Appeals for the Ninth Circuit agreed and, after extensive
11 analysis, held the Nevada statute unconstitutional. The burden
12 has been met by Respondent, and the statute's "presumed validity"
13 has been conclusively rejected.

14 B. THIS STATUTE IS NOT SO "NARROWLY DRAWN"
15 AS TO PASS CONSTITUTIONAL SCRUTINY.

16 Petitioner asserts that N.R.S. 200.030(1)(b) falls into
17 the "extremely narrow category of homicide ... defined in large
18 part in terms of the character or record of the offender." Pet.
19 Br. p. 13, citing Woodson v. North Carolina, 428 U.S. 280 (1976).
20 Petitioner repeatedly asserts that Nevada gives due consideration
21 to the character and record of the accused through this statute.
22 Petitioner states that SHUMAN's character has been duly considered
23 "at least indirectly" by the Nevada Legislature. Pet. Br. p. 19.
24 Petitioner Asserts that his sentence alone - the sole criteria
25 for the imposition of the death sentence - satisfies this Court's
26 strict requirements that:

27 the sentencer ... not be precluded from considering, as
28 a mitigating factor, any aspect of a defendant's char-
29 acter or record and any of the circumstances of the
30 offense that the defendant proffers as a basis for a
31 sentence less than death. Lockett v. Ohio, 438 U.S.
32 586, 604 (1978).

33 ///

See Also Eddings v. Oklahoma, 455 U.S. 104 (1982). In Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), this Court noted that a statute which mandates an automatic death sentence for an intentional killing by a person serving a life sentence still fails to afford constitutional protection.

Only the third category of the Louisiana first-degree murder statute, covering intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law. See Gregg v. Georgia, 428 U.S., at 186, 96 S.Ct., at 2931; Woodson v. North Carolina, 428 U.S., at 287 n. 7, 292-293 n. 25, 96 S.Ct., at 2983 n. 7, 2985 n. 25.

Id. at 334 n. 9 (Stewart, Powell and Stevens, J.J.) (plurality opinion) (emphasis added).

Nevada's statute is not so "narrowly drawn" as to exempt all mitigating evidence. Under this statute, one need only be serving a life sentence without possibility of parole. Life-term prisoners, the subject of this mandatory capital punishment legislation, are a highly diverse class. Not all life-term inmates are convicted murders,¹ nor even incarcerated for crimes of violence.² Furthermore, not all convicts who are in the

1. Any person convicted of Kidnaping in the first degree, N.R.S. 200.320(1); Sexual Assault, N.R.S. 200.366(2)(a)(1); Battery, N.R.S. 200.400(3); Dueling, N.R.S. 200.410; anyone who aids and abets these crimes, N.R.S. 194.020; is liable for punishment in the state prison for life without the possibility of parole.

2. One can be sentenced to life without the possibility of parole for writing bad checks. N.R.S. 207.010(2).

service of murder sentences are alike;³ many are considered model inmates, and their crimes of an aberrational nature.⁴ Long-term offenders, in general, have institutional records that are qualitatively and quantitatively better than short-term prisoners.⁵ There is no evidence to suggest that the commission of prison homicides varies as a function of whether the death penalty is available as a sanction for murder within a jurisdiction.⁶ When taken together, although not definitive, these indicators would suggest that, "license to kill" arguments notwithstanding, life-term inmates do not constitute a class of inmates who are in need of unique threatened sanctions in order to deter them from anti-social institutional conduct, including the commission of murder during the service of their prison sentences.

The "license to kill" argument, that is, that the lifer who is not punishable by death in the event that he murders is effectively beyond lawful punishment, cannot be taken at face value. Most, although not all, life-term inmates have realistic

3. E.G., Unkovic & Albin, The Lifer Speaks for Himself: An Analysis of the Assumed Homogeneity of Live-Termers, 15 Crime & Delinq. 156 (1969); Stanton, Murderers on Parole, 15 Crime & Delinq. 149 (1969); Flanagan, Correctional Policy and the Long-Term Prisoner, 28 Crime & Delinq. 82, 82-83 (1982).

4. See Flanagan, Correctional Policy, *supra*, see also, generally, Purman v. Georgia, 408 U.S. 238, 352 n. 17, 355 (1972) (Marshall, J., concurring); Amsterdam, Capital Punishment, The Stanford Magazine 42 (Fall/Winter 1977).

5. See Flanagan, Correctional Policy, *supra*.

6. An excellent description and graphic depiction of the point that the death penalty serves a marginal deterrent value may be found at Zeisel, The Deterrent Effect of the Death Penalty: Facts v. Faith, 1976 Sup.Ct.Rev. 317, 319-21.

prospects for parole.⁷ Thus, inmates like SHUMAN are not immune from legal sanctions short of execution. Additionally, the superior deterrent value of a mandatory death penalty over a permissive capital sentencing system must still be demonstrated, in order to justify the selection of a mandatory scheme of punishment instead of the ordinary, guided discretion system.⁸

There are significant potential differences between the circumstances and the defendants involved in murders by life-term individuals who are indiscriminately subjected to a mandatory death sentence by Nev. Rev. Stat. §200.030 (1973).⁹ First, life-term prisoners may differ widely in the psychiatric and emotional health, their prior disciplinary record within the prison, their age, their intelligence, and their potential for rehabilitation.

7. A substantial minority of jurisdictions allow for prison sentences of life imprisonment without the possibility of parole. Most inmates who are in the service of "life" sentences have reason to be optimistic that they will someday be considered for and granted parole. See Lifers, 5 Corrections Compendium 1, 2-6 (Apr. 1981); see also Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 30 n. 10 (Marshall, J. dissenting) (noting that "parole is the method of release for approximately 70% of all criminal offenders returned each year to the community," and that "[i]n some states, the figure is as high as 97%"); State v. Holder, 635 S.W.2d 673, 692 (Mo. 1982), cert. denied, 459 U.S. 1137 (1983). "It is common knowledge that, today, 'life' imprisonment is a misnomer. Only a small percentage of inmates with life sentences serve for life." 635 S.W.2d at 692 (Seiler, J., dissenting).

8. Social science has failed to demonstrate that a significant relationship exists between the homicide rate within a jurisdiction and whether or not that jurisdiction has a system of mandatory capital punishment. See Acker, Mandatory Capital Punishment for the Life-Term Inmate Who Commits Murder: Judgments of Fact and Value in Law and Social Science, 11 New England Journal on Criminal and Civil Confinement, 2 (summer 1985).

9. See Unkovic & Albin, The Lifer Speaks, supra, (life-term prisoners are not homogeneous, but a widely-differing group of personalities).

They may be serving life sentences for widely differing reasons. As discussed infra, an inmate may be serving a sentence of life imprisonment without possibility of parole even though he has never been convicted of a violent crime or of murder.¹⁰

Secondly, the circumstances of the crime at bar may vary widely. An inmate may be swept up in a prison riot which results in the death of a guard, inmate or hostage. An inmate may feel compelled to kill another inmate who has threatened him, or who is attacking the warden, guard, hostage or another inmate. Indeed, Nev. Rev. Stat. §200.030(1)(b)(1973) would apply to any murder committed by an escapee who had evaded capture and long since returned to an otherwise normal life.¹¹

These and similar considerations may or may not be sufficient to convince a sentencing authority to refrain from imposing death in any particular case. However, they are all clearly relevant and would obviously serve to distinguish crimes and defendants that this statute treats as "a faceless, undifferentiated mass." Woodson v. North Carolina, 428 U.S. at 304. Because Nev. Rev. Stat. §200.030(1)(b)(1973) forbids the sentencer to consider "any aspect of a defendant's character or record and any of the circumstances of the offense," Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), this statute is unconstitutional.

10. See e.g., Nev. Rev. Stat. §§207.010(2); 200.400(3).

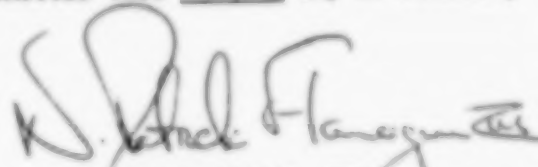
11. Even if the Eighth Amendment could tolerate some narrowly-drawn mandatory death penalty statute for certain murders by life-term prisoners, N.R.S. 200.030(1)(b) is far too broad to fit in that narrow exception. Subsection (1)(b) does not apply solely to intentional homicides of prison guards by people who have actually killed before and are either incarcerated or in the act of escaping. As discussed above, it applies to murders of inmates, visitors, or civilians neither present in the prison nor associated with law enforcement. It also applies to persons who have never actually killed before.

1 The reason that this Court should deny the Petition for
2 Certiorari is that the decisions of the United States District
3 Court and the Court of Appeals for the Ninth Circuit are correct.
4 This Court has had the opportunity to overturn a lower state
5 court ruling declaring a similar statute to be unconstitutional
6 and has so declined. See People v. Smith, 468 N.E.2d 879 (N.Y.
7 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 1226, 84 L.Ed.2d 364
8 (1985). There are no conflicts among the circuits, nor is this
9 question likely to affect any other citizen, as Nevada has subse-
10 quently amended its capital sentencing scheme.

11
12 CONCLUSION

13 Nev. Rev. Stat. §200.030(1)(b)(1973) is too broad a
14 statute to fit into the "narrow category" reserved by this Court.
15 The "presumption of validity" has been destroyed by the able
16 analysis of the lower Federal courts. This statute violates the
17 Eighth and Fourteenth Amendments to the United States Constitu-
18 tion. The Petition for Writ of Certiorari should be denied.

19 RESPECTFULLY SUBMITTED this 14th day of October,
20 1986.

21 
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23 N. PATRICK FLANAGAN, III
24 Assistant Federal Public Defender
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that I am an employee of the
Office of the Assistant Federal Public Defender for the
District of Nevada, and that, on this date, I served the
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Brief in Opposition to the Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit
for RAYMOND WALLACE SHUMAN, No. 86-___.

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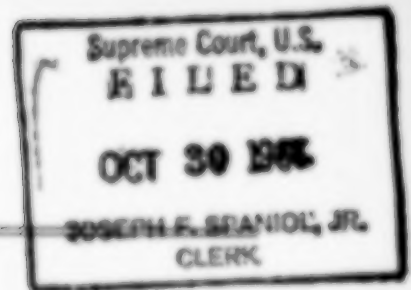
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DATED this 15th day of October, 1986.


LOIS CAROLE SHIMOTORI, Secretary

REPLY BRIEF

No. 86-246



IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GEORGE SUMNER, Director, Nevada Department of Prisons,
BRIAN McKAY, Attorney General of Nevada,
Petitioners,

v.

RAYMOND WALLACE SHUMAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI

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RAYMOND WALLACE SHUMAN,

Respondent.

I. AT THE TIME OF SHUMAN'S CONVICTION
ONLY VIOLENT OFFENDERS WERE SUBJECT
TO SENTENCES OF LIFE WITHOUT THE
POSSIBILITY OF PAROLE IN NEVADA

Respondent incorrectly states in the
Brief in Opposition to the Petition for
Writ of Certiorari that under Nevada law
at the time of Shuman's conviction and
death sentence that one could be sentenced
to life without the possibility of parole
for writing bad checks. See Brief in
Opposition, p. 5, n. 2. Respondent makes

reference to the Nevada Habitual Criminal Statute which is codified as Nevada Revised Statute 207.010(2). However, at the time of Respondent Shuman's conviction that statute did not provide for life sentences without the possibility of parole based upon multiple prior felonies. Nevada Revised Statutes § 207.010(2) provided in pertinent part as follows:

Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been three times convicted, whether in this state or elsewhere of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state prison for life 1971 Nev. Stat., Ch. 123, § 1, p. 173, subsequently amended 1977 Nev. Stat., Ch. 193, p. 360 (emphasis added).

Under Nevada law when a statute fails

to specify whether or not a sentence is with or without parole, the sentence is to be served with the possibility of parole. See Spillers v. State, 84 Nev. 23, 32, 436 P.2d 18, 23 (1968) (the possibility of parole is not precluded unless the legislature has expressly granted that authority). Thus, respondent has improperly stated to this Court that non-violent offenders could be sentenced to life without the possibility of parole at the time of Shuman's conviction and sentence.

On the contrary, examination of Nevada law, and particularly those statutes referred to by respondents, establishes that the Nevada death penalty in question could only be applied to a narrow group of the worst criminals incarcerated in the State prison. Nevada's mandatory death penalty as applied to Shuman, could only have been applied to a small group of offenders who had already received the worst possible sentence (short

of the death penalty) for their crimes of violence. For example, only first degree kidnappers who had inflicted substantial bodily harm on their victims faced a sentence of life with or without the possibility of parole. See 1973 Nev. Stat., Ch. 798, §§ 5-8, pp. 1804-1805. Only a rapist who had inflicted substantial bodily harm on the victim faced life in prison with or without the possibility of parole. Id. p. 1805. A criminal defendant convicted of battery faced life in prison with or without the possibility of parole only where substantial bodily harm to the victim had been caused. Id. Finally, Nevada's law prohibiting dueling, Nevada Revised Statute 200.410, provided for a conviction of first degree murder where the injured party dies within a year and a day of the duel. The sentence for first degree murder at the time was life with or without the possibility of parole. Id. p. 1804. Finally, those

criminal defendants who were principals in the above crimes could also have received similar sentences of life with or without the possibility of parole. See Nevada Revised Statute 194.020. This review of Nevada law supports petitioners' argument that the mandatory death provision applied to Shuman is a narrowly drawn statute which significantly defines the character of the accused. Each of those persons incarcerated for life without the possibility of parole who then commit a murder in prison, is already a criminal defendant who has committed one of the worst crimes known to this society. Only first degree murderers, first degree kidnappers, rapists or a defendant who has committed battery with intent to commit sexual assault, all with extreme injury to the victim, were subject to mandatory death under Nevada law. This is obviously a very limited group of criminal defendants. In each case, the

court or the jury has previously decided that the character of the defendant and the severity of his prior offenses are such that he should never again be a free member of society. Respondent's inaccurate representation of Nevada law as it existed at the time of Shuman's conviction underscores petitioners' position that the statute as applied to Shuman in this case is sufficiently narrowly drawn and gives due consideration of the character of the accused.

In light of the foregoing, the need for review of the action below is apparent.

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Petitioners' respectfully request that this Court grant certiorari herein.

Respectfully submitted this 29th day of October, 1986.

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REPLY BRIEF

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PETITIONERS' REPLY MEMORANDUM.

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Respondent incorrectly states in the Brief in Opposition to the Petition for Writ of Certiorari that under Nevada law at the time of Shuman's conviction and death sentence that one can be sentenced to life without the possibility of parole for writing bad checks. See Brief in Opposition, p. 5, n. 2. Respondent makes reference to Nevada Habitual Criminal Statute which is codified as Nevada Revised Statute 207.010(2). However, at the time of Respondent Shuman's conviction, that statute did not provide for life sentences without the possibility of parole based upon multiple prior felonies. Nevada Revised Statutes 207.010(2) provided in pertinent part as follows:

Every person convicted in this state of any crime of which fraud or intent to fraud is an element, or of petit larceny, or of any felony, who shall previously have been three times convicted, whether in this state or elsewhere of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state prison for life

....

As amended 1971 Nev. Stat., Ch. 123, § 1, p. 173, subsequently amended 1977 Nev. Stat., Ch. 193, p. 360 (emphasis added).

Under Nevada law when a statute fails to specify whether or not a sentence is with or without parole, the sentence is to be served with the possibility of parole. See Spillers v. State, 84 Nev. 23, 32, 436 P.2d 18, 23 (1968) (the possibility of parole is not precluded unless the legislature has expressly granted that authority). Thus, respondent has improperly stated to this Court that non-violent offenders could be sentenced to life without the possibility of parole at the time of Shuman's conviction and sentence.

On the contrary, examination of Nevada law, and particularly those statutes referred to by respondents, establishes that the Nevada death penalty in question could only be applied to a narrow group of the worst criminals incarcerated in the State prison. Nevada's mandatory death penalty as applied to Shuman, could only have been applied to a small group of offenders who had already received the worst possible sentence (short of the death penalty) for their crimes of violence. For example, only first degree kidnappers who had inflicted substantial bodily harm of their victims faced a sentence of life with or without the possibility of parole. See 1973 Nev. Stat., Ch. 798, §§ 5-8, pp. 1804-1805. Only a rapist who had inflicted substantial bodily harm on the victim faced life in prison with or without the possibility of parole. Id. p. 1805. A criminal defendant convicted of battery faced life in prison with or without the possibility of parole only where substantial bodily harm to the victim had been caused. Id. Finally, Nevada's law prohibiting dueling, Nevada Revised Statute 200.410, provided for a conviction of first degree murder where the injured party dies within a year and a day of the duel. The sentence for first degree murder at the time was life with or without the possibility of parole. Id. p. 1804. Finally, those criminal defendants who were principals in the above crimes could also have received similar sentences of life with or without the possibility of parole. See Nevada Revised Statute 194.020. This review of Nevada law supports petitioners' argument that the mandatory death provision applied to Shuman is a narrowly drawn statute which significantly defines the character of the accused. Each of those persons incarcerated under life without the possibility of parole who then commit a murder in prison is already a

1 criminal defendant who has committed one of the worst crimes
2 known to this society. Only first degree murderers, first
3 degree kidnappers, rapists or a defendant who has committed
4 battery with intent to commit sexual assault, all with extreme
5 injury to the victim, were subject to mandatory death under
6 Nevada law. This is obviously a very limited group of criminal
7 defendants. In each case, the court or the jury has previously
8 decided that the character of the defendant and the severity of
9 his prior offenses are such that he should never again be a free
10 member of society. Respondent's inaccurate representation of
11 Nevada law as it existed at the time of Shuman's conviction
12 underscores petitioners' position that the statute as applied to
13 Shuman in this case is sufficiently narrowly drawn and gives due
14 consideration of the character of the accused.

15 In light of the foregoing, the need for review of the
16 action below is apparent. Petitioners' respectfully request
17 that this Court grant certiorari herein.

18 Respectfully submitted this 29th day of October, 1986.

19 BRIAN McKAY
20 Attorney General

21 By: William E. Isaef
22 William E. Isaef
23 Chief Deputy Attorney General
24 Heroes' Memorial Building
25 Capitol Complex
26 Carson City, Nevada 89710
27 Telephone: (702) 885-4170
28 Counsel for Respondents
29
30

1 CERTIFICATE OF MAILING

2 I hereby certify that I am an employee of the Office of the
3 Attorney General for the State of Nevada, and that, on this
4 date, I served the foregoing PETITIONERS' REPLY MEMORANDUM by
5 placing said copy in a postpaid envelope addressed to the
6 person(s) below named at the place and address stated below,
7 which is the last known address, and by depositing said envelope
8 and contents in the United States Mail in a regular mail depos-
9 itory.

10 M. DANIEL MARKOFF
11 Federal Public Defender
12 N. PATRICK FLANAGAN, III
13 Assistant Federal Public Defender
14 Federal Building, Suite 4109
15 300 Booth Street
16 Reno, Nevada 89509

17 DATED this 29th day of October, 1986.

18 Beverly J. Saucedo
19 BEVERLY J. SAUCEDO, Secretary
20
21
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23
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27
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29
30

JOINT APPENDIX

(3)
No. 86-246

Supreme Court, U.S.
FILED

JAN 14 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE SUMNER, Director, Nevada Department of Prisons,
BRIAN McKAY, Attorney General of Nevada,
Petitioners,

v.

RAYMOND WALLACE SHUMAN,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

JOINT APPENDIX

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145 100

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

July 24, 1978 - Form for Application for Habeas Corpus under 28 U.S.C. § 2254 filed.

March 16, 1981 - Points and Authorities in Opposition to Application for Habeas Corpus filed by Respondents.

April 28, 1981 - Clarification of Grounds for Petition for Writ of Habeas Corpus filed by Petitioner.

September 1, 1981 - Supplemental Points and Authorities in Opposition to Application for Habeas Corpus filed by Respondents.

March 24, 1982 - Order entered denying relief on some grounds, and ordering additional briefing and taking of evidence.

May 18, 1982 - Supplemental Points and Authorities Regarding Eddings v. Oklahoma filed by Respondents.

May 27, 1982 - Supplemental Points and Authorities in Support of Petitions for Writ of Habeas Corpus filed by Petitioner.

August 19, 1983 - Order entered finding Shuman's mandatory death sentence unconstitutional and denying relief on other grounds.

September 14, 1983 - Respondents' Notice of Appeal filed.

CHRONOLOGICAL LIST OF RELEVANT
DOCKET ENTRIES, CONTINUED

September 16, 1983 - Petitioner's
Notice of Cross-Appeal filed.

June 12, 1986 - Opinion and Judgment
of the Court of Appeals for the Ninth
Circuit.

Filed July 24, 1978

FORM FOR USE IN APPLICATIONS

FOR HABEAS CORPUS UNDER 28 U.S.C. §2254

RAYMOND WALLACE SHUMAN
Name

7449
Prison Number

NEVADA STATE PRISON, CARSON CITY, NEVADA
Place of Confinement

United States District Court for the
District of Nevada

Case No. _____
(To be supplied by Clerk of U.S. District
Court)

RAYMOND WALLACE SHUMAN, PETITIONER
(Full name) (Include name under which
you were convicted)

CHARLES L. WOLFF, JR.,
DIRECTOR, RESPONDENT
(name of Warden, Superintendent Jailor,
or authorized person having custody of
petitioner)

and

THE ATTORNEY GENERAL OF THE STATE OF
NEVADA, ADDITIONAL RESPONDENT

(If petitioner is attacking a judgment
which imposed a sentence to be served in
the future, petitioner must fill in the

name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, he should file a motion under 28 U.S.C. §2255, in the federal court which entered the judgment.)

PETITION FOR WRIT OF HABEAS

CORPUS BY A PERSON IN

STATE CUSTODY

INSTRUCTIONS--READ CAREFULLY

[Instructions Omitted in Printing]

PETITION

1. Name and location of court which entered the judgment of conviction under attack: First Judicial District Court, Carson City, Nevada.
2. Date of judgment of conviction: May 12, 1975.
3. Length of sentence: Death. Sentencing judge: Frank B. Gregory.
4. Nature of offense or offenses for

which you were convicted: Capital Murder.

5. What was your plea? (Check one)
 - (a) Not guilty (X)
 - (b) Guilty ()
 - (c) Nolo contendere ()

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: _____

6. Kind of trial: (Check one)
 - (a) Jury (X)
 - (b) Judge only ()
7. Did you testify at the trial? Yes ()
No (X)
8. Did you appeal from the judgment of conviction? Yes (X) No ()
9. If you did appeal, answer the following:
 - (a) Name of court: Nevada Supreme Court
 - (b) Result: Affirmed.

(c) Date of result: May 17, 1978.

If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: Rehearing denied, June 19, 1978.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (X)
No. ()

11. If you answer to 10 was "yes", give the following information:

(a) (1) Name of court: First Judicial District Court, Carson City, Nevada.

(2) Nature of proceeding: Post Conviction Habeas Corpus.

(3) Grounds raised: Same grounds as sub-paragraphs 12-G, H, I and J in this

petition.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()
Not as yet.

(5) Result: N/A.

(6) Date of result: N/A.

(b) As to any second petition, application or motion give the same information:

(1) Name of court: N/A.

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result: _____

(6) Date of result: _____

(c) As to any third petition application or motion, give the same information:

- (1) Name of court: N/A.
(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes () No ()

(5) Result: _____

(6) Date of result: _____

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes ()
No () Not as yet.

(2) Second petition, etc. Yes ()

No ()

(3) Third petition, etc. Yes ()

No ()

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. As to all grounds on which you have previously exhausted state court remedies, you should set them forth in this petition if you wish to seek federal relief. If

you fail to set forth all such grounds in this petition, you may be barred from presenting them at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted all your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do not check any of the

grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure, [whether the state has not provided a full and fair hearing on the merits of the Fourth Amendment claim].
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest, [whether the state has not provided a full

and fair hearing on the merits of the Fourth Amendment claim].

- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.
- A. Ground one: The lower court allowed testimony of statements

made by the decedent into evidence as dying declarations and exceptions to the hearsay rule.

Supporting FACTS (tell your story briefly without citing cases or law): On August 27, 1973, at approximately 9:00 in the evening, the victim, Rubin Bejarano, ran from his cell in the Maximum Security Prison, his body aflame. The fire was subsequently extinguished, and he was transported to Carson-Tahoe Hospital for emergency treatment. During the trial, several statements of Bejarano were admitted, over objection, as "dying declarations" and exceptions to the hearsay rule.

- B. Ground two: Petitioner was convicted of capital murder

under a statute that mandated the death penalty for life-term prisoners upon conviction.

Supporting FACTS: The class of people, that were subject to a mandatory death sentence upon a capital murder conviction, was irrationally and arbitrarily defined, and punishment of that class by mandatory death does not serve a compelling state interest. A life-term prisoner is not necessarily more incorrigible than a prisoner serving 99 years, or some other term of years. There is no evidence that the threat of mandatory death deters life-term prisoners from committing murder. There are possible punishments of life-term prisoners that are less severe than mandatory

death.

- C. Ground three: Petitioner was prejudiced in his right to a presumption of innocence when he was required to wear his prison garb during his trial.

Supporting FACTS: Petitioner was required to wear his prison clothes during his trial.

- D. Ground four: Petitioner was denied his Sixth Amendment right to effective assistance of counsel.

Supporting FACTS: Counsel for petitioner failed to call witnesses who would have placed Shuman away from the scene of the crime. Petitioner's trial counsel only discussed the case with Petitioner once for five minutes before trial.

- E. Ground five: Petitioner's guilt

was not proven beyond a reasonable doubt.

Supporting FACTS: Insufficient evidence was presented to the jury to support Petitioner's conviction of capital murder.

- F. Ground six: Petitioner's prior conviction was not adequately shown to have been constitutionally obtained.

Supporting FACTS: The record does not show that petitioner was represented by counsel when he was convicted of the murder for which he is presently serving a sentence of life without possibility of parole.

- G. Ground seven: The reasonable doubt instruction given to the jury in petitioner's case is unconstitutional.

Supporting FACTS: The jury

instruction given which defined "reasonable doubt" stated that "[d]oubt to be reasonable must be actual and substantial, not mere possibility or speculation." Equating "reasonable doubt" to "substantial doubt" is objectionable and in violation of the United States Constitution as it lessens the State's burden of proof.

- H. Ground eight: Nevada's appellate review of death sentences is inadequate.

Supporting FACTS: Nevada's appellate procedure fails to compare cases in which the death sentence was imposed with other cases in which the death penalty was not imposed.

- I. Ground nine: The gas chamber is an unnecessarily cruel means of

execution, constituting wanton torture in excess of the means necessary to extinguish human life.

J. Ground ten: The death penalty is unjustified as a means for achieving any legitimate governmental end and is therefore excessive.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them: Grounds 12-G, H and I were not presented on petitioner's direct appeal to the Nevada Supreme Court, but have been filed with the First Judicial District Court in Carson City as a post-conviction habeas corpus action.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes (X) No ()

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: Gary A. Sherrin, Esq., 102 South Curry St., Carson City, NV 89701.

(b) At arraignment and plea: Don Aimar, Esq., c/o Nevada Industrial Commission, Carson City, NV. OR Gary Armentrout, Esq., P. O. Box 10, Reno, NV 89504.

(c) At trial: Don Aimar, Esq., c/o Nevada Industrial Commission, Carson City, NV 89701.

(d) At sentencing Don Aimar, c/o Nevada Industrial commission, Carson City, NV 89701.

(e) On appeal: Michael R. Griffin,
Esq., 309 E. John St., Carson
City, NV 89701 OR J. Thomas
Susich, Esq., c/o Douglas County
District Attorney, Minden, NV.

(f) In any post-conviction
proceeding: J. Gregory Damm,
Esq., P. O. Box B, Carson City,
NV 89701.

(g) On appeal from any adverse
ruling in a post-conviction
proceeding: _____

16. Were you sentenced on more than one
count of an indictment, or on more
than one indictment, in the same
court and at the same time? Yes ()
No (X)

17. Do you have any future sentence to
serve after you complete the sentence
imposed by the judgment under attack?
Yes () No (X)

(a) If so, give name and location of

court which imposed sentence to
be served in the future: _____

(b) And give date and length of
sentence to be served in future:

(c) Have you filed, or do you
contemplate filing, any petition
attacking the judgment which
imposed the sentence to be
served in the future? Yes ()
No ()

Wherefore, petitioner prays that the
court grant petitioner relief to which he
may be entitled in this proceeding.

Executed at Carson City, Nevada.

Wherefore RAYMOND WALLACE SHUMAN
being first duly sworn under oath, pre-
sents that he has read and subscribed to
the above and states that the information
therein is true and correct.

/s/ Raymond Wallace Shuman
Signature of Petitioner

Subscribed and sworn before me this
24th day of July, 1978.

/s/J. P. Harbour
Notary Public or other person
authorized to administer an oath

Signature of Attorney (if any)

POINTS AND AUTHORITIES IN OPPOSITION
TO APPLICATION FOR HABEAS CORPUS

Filed March 16, 1981

[Caption Omitted in Printing]

Respondents, by and through counsel,
RICHARD H. BRYAN, Attorney General of the
State of Nevada, submit these points and
authorities in opposition to Petitioner's
Application for Habeas Corpus relief
regarding his May 12, 1975 conviction for
first degree murder.

I.

FACTS

Petitioner Raymond Wallace Shuman was
convicted in 1958 of a first degree murder
in Mineral County, Nevada. He was serving
a sentence of life imprisonment without
the possibility of parole upon that
conviction when in 1975 he was convicted
of a murder at the Nevada State Prison.
At that time NRS 200.030 provided in
pertinent part that:

"1. Capital murder is murder which is perpetrated by:

. . .

(b) A person who is under sentence of life imprisonment without possibility of parole.

. . .

5. Every person convicted of capital murder shall be punished by death."

This provision was in effect from 1973 to 1977.

Shuman appealed his 1975 conviction to the Nevada Supreme Court. This appeal was unsuccessful. Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978).

In July, 1978, Shuman filed a Petition for Writ of Habeas Corpus in the First Judicial District Court of Nevada (see copy attached as Exhibit A). On the same day Shuman filed the instant Application for Habeas Corpus. In an order filed on December 27, 1978, the state district court judge dismissed the Petition for

Writ of Habeas Corpus (see copy of the Order attached hereto as Exhibit B). The Petition was dismissed on the grounds that some of the claims had already been decided by the Nevada Supreme Court on direct appeal, and that Shuman did not offer any excuse as to why all other issues had not been raised on direct appeal. This decision was appealed to the Nevada Supreme Court, and in an Order filed October 29, 1980, that court dismissed the appeal, citing Shuman's failure to raise issues on direct appeal (see copy attached hereto as Exhibit C).

On direct appeal from his conviction, Shuman raised the following issues:

1. The admissibility of the victim's dying declarations;
2. The constitutionality of Nevada's mandatory death sentence;
3. The effect of prison clothes worn at trial;

4. Denial of effective assistance of counsel;

5. The sufficiency of the evidence to support the conviction;

6. Representation by counsel in 1958 proceedings.

Shuman asserts each of these issues in this proceeding. In addition, Shuman raises four issues which were not presented to the Nevada appellate court on direct appeal. These additional four issues were raised in the state Petition for Writ of Habeas Corpus, and were dismissed due to Shuman's failure to follow the proper state procedure.

Respondents, as requested by this Court, will first address the effect of Shuman's Application for Habeas Corpus regarding his June 1958 conviction on the instant Application. The Respondents will then address the individual issues raised in petitioner's Application.

II.

LAW

A. The 1958 murder conviction should not now be examined because all rights to such review have been forfeited.

For more than fifteen years Shuman failed to raise any issues concerning his 1958 murder conviction in either the state or Federal courts. He did so only after his 1975 murder conviction.

Shuman's 1958 murder conviction was obtained while he was represented by counsel. The affidavit of that attorney (see copy attached hereto as Exhibit D) sets forth that with the attorney's advice Shuman made a deliberate decision not to appeal the 1958 Mineral County murder conviction.

Federal courts may deny relief to habeas applications who "deliberately by-pass the orderly procedures of the state courts" and who, in so doing,

forfeit their state court remedies.

Wainwright v. Sykes, 433 U.S. 72, 83, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); of: Green v. Wyrick, 462 F.Supp. 357 (W.D.Mo. W.D. 1978); (petition denied where record reflected deliberate by-pass of state procedure); Evans v. Maggio, 557 F.2d 430 (5th Cir. issues were not raised on direct appeal); Johnson v. Craven, 432 F.2d 418 (9th Cir. 1970) (affirmed denial of application for writ of habeas corpus where issue had not been presented to state court on direct review); Murch v. Mottram, 409 U.S. 42, 93 S.Ct. 71, 34 L.Ed.2d 194 (1972) (failure to assert issue in state post-conviction relief procedure constituted deliberate by-pass), Martini v. Sheriff, L.A. County, 325 F.Supp 649 (C.D.Cal. 1971) (prisoner who, inter alia, offered no plausible excuse for failing to attack conviction for thirteen years, denied writ of habeas

corpus).

The state Petition for Writ of Habeas Corpus was denied for the failure to present the issues by direct appeal and for failure to offer a reasonable explanation as to why he did not appeal. Nevada law requires such a showing. See: Johnson v. Warden, 89 Nev. 476, 515 P.2d 63 (1973); Lockett v. Warden, 91 Nev. 681, 541 P.2d 910 (1975); Junior v. Warden, 91 Nev. 111, 532 P.2d 1037 (1975); Wheby v. Warden, 92 Nev. 360, 550 P.2d 419 (1976).

B. The issues raised by Shuman on direct appeal.

1. General principles.

A federal court when reviewing a habeas corpus petition must look to the existing substantive law of the state involved. Wilson v. Cox, 312 F.Supp. 209 (D.Va. 1970). Furthermore, it is the general rule that great latitude is ordinarily given to state courts in the

selection of their procedures and decisions on evidentiary questions. Gibson v. Blair, 467 F.2d 842 (5th Cir. 1972). It is also a principle of federal habeas corpus law that the state interpretation of its law and procedure is binding on the federal courts unless a showing is made that the petitioner has been denied primary constitutional rights. Miller v. Crouse, 346 F.2d 301 (10th Cir. 1965); Mason v. Dunbar, 317 F.2d 358 (9th Cir. 1963).

2. The admission of the victim's dying declaration was proper.

As discussed above, the decision of the Nevada state court on the admission of the victim's dying declarations is entitled to great weight. In Shuman v. State, the Nevada Supreme Court held that the victim's dying declarations were admissible, saying:

"... the trial court

permitted, over objection, the officer to testify that Bejarno stated repeatedly, '[a]ll over a window.'

In State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948), this court ruled that a lay person is competent to testify when an injured person is conscious of impending death, providing the witness observed the injured person, his symptoms and expressions, and the declarant's general physical condition. Teeter supports the trial court's ruling in admitting Bejarno's statement, '[a]ll over a window' made repeatedly while enroute to the hospital emergency room.

Shuman suggests, however, that even so, the statement should not have been received, because they did not include any relevant facts surrounding the actual burning; that they were only the opinion of the declarant relating to the reason for the assault. Prior to the adoption of NRS 51.335(2) in 1971, Nevada did not admit as dying declarations, expressions of opinion. The authorities were split regarding what amounted to a statement of fact relating to an injurious act and what was only an opinion. Wigmore, however, had long noted that the fact/opinion distinction was unsound and should be abolished. See cases collected

at 5 J. Wigmore, Evidence § 1434, at 282 - 83 (1974). The federal rule does away with this distinction and permits dying declarations to include both the cause and the circumstances surrounding the declarant's death. See 11 Moore's Federal Practice § 804.01(11), at VIII-228 to 229 (1976). NRS 51.335, taken from example 3 of proposed federal rule 804, is broader than the rule as finally enacted by Congress. We therefore conclude that our statute, NRS 51.335, dispenses with the fact/opinion distinction and that the declarant's statements were properly received.

. . .

Berjarno's other dying declaration was made at Vallejo Medical Center two days prior to his death. Berjarno's voice was inaudible. He responded to questions, however, by nodding his head either affirmatively or negatively. The questioning, by a county investigator, shows that Berjarno was in full possession of his mental faculties. He identified Shuman as his assailant. The extremity of Berjarno's situation was obvious. He was wrapped in gauze from head to foot, immobilized in a special bed, and could not control his shaking.

In Teeter, this court said:

'[I]t is not necessary

for the declarant to state to anyone, expressly, that he knows or believes he is going to die, or that death is certain or near, or to indulge in any like expression; nor is it deemed essential that his physician, or anyone else, state to the injured person that he will probably die as a result of his wounds, or that they employ any similar expression. It is sufficient if the wounds are of such a nature that the usual or probable effect upon the average person so injured would be mortal; and that such probable mortal effect is not hidden, but, from experience in like cases, it may be reasonably concluded that such probable effect has revealed itself upon the human consciousness of the wounded person . . .'

Id. 65 Nev. at 628, 200 P.2d at 679

(emphasis added).

We believe that the probable effect of Berjarno's burns was sufficiently revealed to him and that he knew or strongly believed that his death was imminent. As Professor Wigmore observed: 'The circumstances of

each case will show whether the requisite consciousness existed; and it is poor policy to disturb the ruling of the trial judge upon the meaning of these circumstances.' 5 J. Wigmore, Evidence § 1442 at 398-301 (1974). Therefore, we conclude that the dying declarations were properly received."

94 Nev. at 267-269, 578 P.2d at 1185.

(Footnote omitted.)

See also: Pell v. Arn, 536 F.2d 123 (6th Cir. 1976) (admission of dying declarations did not deny petitioner fair trial).

It is clear that the admission of the dying declarations of Shuman's victim was a proper exercise of the discretion of the state court. This claim of error will not support federal habeas corpus.

3. Nevada's mandatory death sentence is constitutional.

At the time of Shuman's 1975 conviction, the statute under which he was convicted provided:

"1. Capital murder is murder which is perpetrated by:

. . .

(b) A person who is under sentence of life imprisonment without possibility of parole.

. . .

5. Every person convicted of capital murder shall be punished by death."

NRS 200.030(1) and (5).

The Supreme Court of the United States has established that the Eighth Amendment ban upon cruel and unusual punishment does not prohibit the imposition of the death penalty. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). That the concerns which the high court expressed in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), centered upon the capricious penalty selection process rather than the fact of the imposition of the death penalty in appropriate cases,

was brought into focus by the Gregg decision. The majority in Furman analogized capital punishment sentencing to a "senseless lottery" and pointed out that it was as inconstant as "lightning." 408 U.S. at 309. The court demanded the development of standards which gave consistency to the form of sentencing procedures, a consistency which was required by the "cruel and unusual punishment" clause of the Eighth Amendment.

Justice Brennan speaking with the majority in Furman gave us a cumulative test to measure whether a punishment, and presumably its application, would violate the Eighth Amendment.

"If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that

punishment violates the command of the Clause." 408 at 282.
It was the second qualification of

this test ("if there is a strong possibility that it is inflicted arbitrarily") with which the Furman decision was primarily concerned.

The situation of a life prisoner without possibility of parole who is again convicted of first degree murder is unique. An examination of this situation and its comparison with Justice Brennan's standard reveals that a mandatory death sentence is singularly consistent with that clause, for here is a definition of a capital crime which, by its initial imitation of class membership, is so significantly characterized in nature and record that it avoids the proscriptions of Furman.

The fact that this group cannot effectively be punished or deterred with any less severe penalty, since they have

already suffered to lose every liberty short of death, is their isolating characteristic. It was in recognition of this characteristic that the Nevada supreme Court stated:

"Unlike all other situations, in which the question presented to the jury is the degree or nature of punishment to the jury is the degree or nature of punishment that should be imposed, the question presented in this instance, if a separate hearing were required, would be whether any effective punishment should be imposed at all upon a prisoner already serving a life sentence without possibility of parole."

Shuman v. State, 94 Nev. 265, 271,

578 P.2d 1183, 1186 (1978). There is here such a controlled environment and class of persons that aggravating and mitigating factors could hardly be more uniform.

"What 'mitigating circumstances' could be offered that would justify the result that an individual convicted of murder should suffer no practical legal consequences for that deliberate act? It is this circumstance that makes the case 'unique'." *Id.* (Emphasis applied).

The Nevada Legislature obviously determined that there was no other effective penalty for this class of offenders. It is evident that any other punishment, such as concurrent and consecutive life sentences, could barely prove more than an esoteric deterrent to a class of hardened murders whose jaundiced disrespect for the liberty and lives of others is already legally so thoroughly established.

In cases which have previously dealt with the mandatory imposition of the death penalty, the United States Supreme Court has specifically excepted the circumstances represented by the present case.

Woodson v. North Carolina, 428 U.S. 280, 287 n.7, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); S. Roberts v. Louisiana, 428 U.S. 325, 334 n.9, 96 S.Ct. 3001, 49 L.Ed.2d 954 (1976); H. Roberts v. Louisiana, 431 U.S. 633, 637 n.5, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977).

S. Roberts refers directly to Gregg in stating:

"... Only the third category of the Louisiana first-degree murder statute, covering intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law." S. Roberts, 428 U.S. at 334 n.9. See Gregg, 428 U.S. at 186.

In Lockett v. Ohio, 438 U.S. 586, 603 n.11, 98 S.Ct. 2954, 57 L.Ed. 973 (1978) the U.S. Supreme Court specifically left open the question now presented in this case by Nevada's 1973-1977 mandatory death sentence statute saying:

"We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence, as, for example, when a prisoner - or escapee - under a life sentence is found guilty

of murder."

Earlier in Gregg v. Georgia, the court had stated:

"[t]here are some categories of murder such as murder by a life prisoner, where other sanctions [than death] may not be adequate."

428 U.S. at 186.

It was exactly the lack of a definition "at least in significant part in terms of the character or record of the individual offender," S. Roberts, 428 at 334 n.9, which the court found to be the constitutional flaw in the North Carolina statute in Woodson. It was characterized there as its:

"... failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." H. Roberts, 431 U.S. at 648-9.

In H. Roberts, a statute which imposed a mandatory death sentence for the

first-degree murder of a police officer (engaged in the performance of his duties) was declared unconstitutional for identical reasons.

It is clear that the focus of the Woodson and Roberts decisions concerns the apportionment of the mitigating against the aggravating circumstances which is supposedly rendered impossible by a mandatory sentencing procedure. Respondents seek to show that in the present case the balancing of mitigating against aggravating circumstances is rendered unnecessary. As Justice Rhenquist observed in his H. Roberts dissent:

"... the question is not whether mitigating factors might exist, but, rather, whether whatever 'mitigating' factors that might exist are of sufficient force so as to constitutionally require their consideration as counterweights to the admitted aggravating circumstance." 431 U.S. at 648-9.

It is perhaps with recognition of the

unique nature of this situation that the court in S. Roberts made reference to a category which "defines the capital crime at least in significant part in terms of the character or record of the individual offender." 428 U.S. at 334 n.9. It is submitted that the situation of an intentional killing by a prisoner who is already serving a life sentence without possibility of parole for murder is a circumstance in which it is a legislatively acknowledged impossibility for mitigating circumstances to outweigh aggravating factors.

It is clear that, at least with regard to this extremely narrow category, a sentencing procedure prescribed by legislative enactment which lacks a discretionary determination of personal characteristics is consistent with constitutional mandates. Justice White's dissenting opinion in S. Roberts seems to

coincide with this conception of the legislature's constitutional power with regard to the determination of criminal character. In S. Roberts, Justice White wrote that:

" . . . even if the character of the accused must be considered under the Eighth Amendment, surely a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death." Id. at 358. (Emphasis supplied).

The capital punishment provision of NRS 200.030 as it was in effect at the time of this homicide was constitutional because it did "define the capital crime at least in significant part in terms of the character or record of the individual offender." Id., at 334, n.9. The statute avoids the problem of being arbitrary and capricious. It avoids what Justice Stewart, speaking for the majority in S. Roberts, called "the Constitutional vice

of mandatory death sentence statutes -- lack of focus on the circumstances of the particular offense and the character and propensities of the offender." S. Roberts, Id. at 333. Here, the circumstances of the offense are known -- murder of a human being inside a prison. The offense itself is known--murder, not manslaughter (or innocent by reason of insanity). The character and propensities of the offender are also known--an inmate sentenced for the crime of murder with a sentence to life imprisonment without the possibility of parole. This statute is consistent in its evaluation of those to whom it applies. It adequately meets constitutional requirements.

The deterrent effect of the criminal process has long been recognized as a legitimate end of the system's operation. This goal may be considered exclusive of the natural concern respecting criminal

rehabilitation where possible. Gregg, 428 U.S. at 155, 183-187. Mr. Justice Marshall observed in his plurality opinion in Powell v. Texas, 392 U.S. 514, 530, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) that the U.S. Supreme Court:

" . . . has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects."

How does society prevent a life prisoner without possibility of parole from perpetrating a homicide against a fellow prisoner? It is abundantly obvious that a further prison sentence when one has little or no hope of ever experiencing freedom is a slight deterrent indeed. When this is coupled with the fact that here is a violent group of people, each with the demonstrated propensity to kill, it is self-evident that there is only one remaining effective deterrent, and that

deterrent is the taking of that person's ability to take another life. Under our system, this can only be accomplished by the death penalty.

The state has a heavy responsibility for the physical and personal welfare of the inmates of its prisons. The imposition of concurrent or subsequent life sentences would be interpreted as a license to kill, if mitigating factors such as the duress of a prison existence were permitted to outweigh the state's interest in protecting its inmates and prison personnel.

Respondents contend that the legislature of the State of Nevada was best able to determine how it wanted to address this dilemma. In Gregg, Justice Stewart, writing for the majority recognized the judiciary's role when he wrote that:

" . . . in assessing a punishment selected by a democratically elected legislature against the

constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people." 428 U.S. at 175.

In interpreting the mandates of Furman with respect to bifurcated trials, Justice Stewart also insisted that:

"We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis. Rather, we have embarked . . . to make clear that it is possible to construct capital-sentencing systems capable of meeting Furman's constitutional concerns." 428 U.S. at 195.

Throughout the Furman decision the capricious nature of the methods under which the death penalty was administered was analogized to lightning in recognition of

the unpredictability of determining where and under what conditions that penalty would be invoked. Having "defined the capital crime at least in significant part in terms of the character or record of the individual offender," S. Roberts, at 334, n.9, the Nevada statute under which the appellant stands convicted has eliminated the capricious sentencing procedures which Furman, found to violate constitutional standards. Respondents urge that a mandatory death penalty for this extremely limited group does not violate due process.

4. Petitioner was not prejudiced by being tried while wearing clothing provided by the prison.

The Nevada Supreme Court in Shuman v. State correctly determined that Shuman was not prejudiced in his right to a presumption of innocence by the wearing at trial of clothing provided by the prison. The

court stated:

"He was not prejudiced, for his status as a prisoner was known to the jury. As the court said in *United States ex rel. Stahl v. Henderson*, 472 F.2d 556, 557 (5th Cir.) cert. denied, 411 U.S. 971 (1973), where the defendant, charged with killing a fellow inmate, was tried in prison clothes: 'No prejudice can result from seeing that which is already known.' Quoted in *Estelle v. Williams*, 415 425 U.S. 501, 507 (1976)."

94 Nev. at 271, 272, 578 P.2d at 1187.

To the same effect: *U.S. v. Dawson*, 563 F.2d 194, 152 (5th Cir. 1977).

5. Petitioner was adequately represented by counsel.

Petitioner claims that he was denied his Sixth Amendment right to effective assistance of counsel on the ground that his counsel failed to call witnesses who would have testified that Shuman was not at the scene of the murder. The Nevada standard by which effective assistance of

counsel is measured is whether the efforts of counsel reduced the trial to a sham, farce or pretense. *Bean v. State*, 86 Nev. 80, 465 P.2d 133, cert. den. 400 U.S. 844 (1970); *Lenz v. State*, 97 Nev. Adv. Op. 22 (1981). Again, the Nevada Supreme Court, in *Shuman v. State*, after reviewing the record before it, decided this issue against the petitioner, saying:

"[h]e asserts that his counsel failed to call witnesses who would have placed Shuman away from the scene of the crime and near a television set in another area when Bejarno was set on fire. (His counsel did present several witnesses who testified that Shuman was near the television set sometime before the fire.) There is a presumption that counsel adequately discharged his duties, and that presumption can be overcome only by strong and convincing proof to the contrary. *Smithart v. State*, 86 Nev. 925, 478 P.2d 576 (1970).

A reading of the record reveals that counsel properly discharged his duties. Such was the ruling of the trial judge in denying Shuman's motion to substitute counsel during his

trial: "[I]t is my personal feeling that Mr. Aimar [Shuman's counsel] is doing an excellent job in protecting the rights of the defendant during the prosecution's case . . . Mr. Aimar is doing an excellent job and he is going to continue to do so." We agree."

94 Nev. at 272, 578 P.2d at 1187.

Even under the "reasonable effective assistance of counsel" standard of Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977) Shuman's claims must be rejected as entirely without merit.

6. The Federal court, in a habeas proceeding should not examine the sufficiency and weight of the State trial evidence.

It is the general rule that the question of the sufficiency of the evidence to sustain a conviction does not rise to constitutional dimensions and may not be considered in federal habeas corpus proceedings. U.S. ex rel. Griffin v. Martin, 409 F.2d 1300 (1st Cir. 1969);

Tinder v. Paula, 468 F.Supp. 792 (D.Mass. 1979). This issue is only cognizable in a federal court where it appears there is "no evidence" to support a conviction. Speigner v. Jago, 603 F.2d 1208 (6th Cir. 1979). The "no evidence" standard was designed to prevent unwarranted intrusions of federal courts into state proceedings. Id.

Shuman's position on this issue was soundly and correctly rejected by the Nevada Supreme Court on direct review:

"Shuman also complains that insufficient evidence was presented to the jury to support his conviction of capital murder. Since we have upheld the admissibility of Bejarno's dying declarations, it would serve no purpose to specify the remaining evidence supporting the verdict. Suffice it to say that there is sufficient evidence in the record to support each and every material allegation of the crime and that in such a case the judgment of conviction may not be disturbed on appeal. Wills v. State, 93 Nev. 443, 566 P.2d 1138 (1977)."

94 Nev. at 272, 578 P.2d 1188.

7. Shuman was represented by counsel at all critical stages of his 1958 trial and conviction.

The record of proceedings in the 1958 murder trial and conviction of Shuman (see copy attached to points and authorities in CIV-R-78-118, ECR) reveals that Shuman was represented by attorney Paul Richards at every critical stage of his 1958 trial and conviction. Furthermore, the Nevada Supreme Court rejected this claim on direct review of Shuman's 1975 conviction, saying:

"Finally, Shuman seeks reversal because, he claims, the record does not show that he was represented by counsel when he was convicted of the murder for which he is presently serving a sentence of life without possibility of parole, citing *Burgett v. Texas*, 389 U.S. 109 (1977).

Burgett is inapposite. There, documents admitted into evidence indicated that the defendant was not represented by

counsel. The court in *Burgett* said: 'In this case the certified records of the Tennessee conviction on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceeding. . . ' *Id.* at 114.

In the case at hand, no such presumption exists, as the evidence offered by the State was an abstract of judgment showing that Shuman was represented by counsel at the time of imposition of sentence. There was no suggestion that Shuman was not represented by counsel at every critical stage of the prior proceeding. Moreover, Shuman failed to object to this evidence at the time of its admission. This court has held repeatedly that failure to object at trial precludes raising the issue on appeal. See, e.g., *Allen v. State*, 91 Nev. 78, 530 P.2d 1195 (1975)."

94 Nev. at 272, 273, 578 P.2d 1188.

8. The reasonable doubt instruction was constitutional.

This issue was not raised on direct appeal and on that ground the Nevada Supreme Court rejected this claim in Shuman's 1978 state petition for writ of

habeas corpus. See Exhibit C attached hereto. Shuman offered no reasonable explanation for his failure to present this issue on direct appeal. The Nevada court determined that Shuman had deliberately by-passed the orderly state procedures. Therefore, under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), this Court should not consider the merits of this claim where petitioner, without explanation, has failed to present this issue to the Nevada appellate court.

However, examination of this issue reveals that it is meritless. The reasonable doubt instruction was in the exact language required by Nevada statute. See NRS 175.211(1). This language has been repeatedly approved by the Nevada Supreme Court. See, e.g.: Cutler v. State, 93 Nev. 329, 336, 566 P.2d 809 (1977). The Nevada definition does not equate

"reasonable doubt" with "substantial doubt." Reasonable doubt is defined in NRS 175.211 (1) as:

"A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual and substantial, not mere possibility or speculation."

The Nevada definition of the term "reasonable doubt" provides a precise and detailed explanation of the elements of that concept. A portion of that explanation involves the use of the term "substantial." It is clear that the word "substantial" is not an expansion of the word "reasonable" but rather is simply an illustration of the meaning of the term reasonable doubt.

After all, a jury instruction is an explanation to laymen of the law on a particular subject. It may be questioned how else this can properly be accomplished other than with such words of explanation and illustration.

It is evident that this instruction resulted in no prejudice to Shuman. In the absence of a showing of prejudice, an allegedly erroneous jury instruction is not a ground for federal habeas corpus relief. Pleas v. Wainwright, 441 F.2d 56 (5th Cir. 1971); Bryan v. Wainwright, 558 F.2d 1108 (5th Cir. 1979); Cordoba v. Harris, 473 F.Supp. 632 (D.N.Y. 1979).

9. "Ground eight" of Shuman's Application for Habeas Corpus is unintelligible.

The eighth ground of Shuman's Application is stated, as follows:

"Nevada's appellate review of death sentences is inadequate. Nevada's appellate procedure

fails to compare cases in which the death sentence was imposed with other cases in which the death penalty was not imposed."

Respondents respectfully submit that this ground, as presently stated is unintelligible, therefore, respondents are unable to prepare an adequate opposition to his argument. Respondents request that Shuman be required to make a more definite statement of this ground, and that thereafter, respondents be allowed sufficient opportunity to respond.

10. Execution by lethal gas is not cruel and unusual punishment.

In a United States Supreme Court case which authorized an execution by electrocution and has never been overruled, the court stated that:

". . . punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more

than the mere extinguishment of life." In Re Klemmer, 136 U.S. 436, 446-447, 10 S.Ct. 930, 34 L.Ed. 519 (1980).

Death by electrocution was also recently approved as being constitutional in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. den. 99 S.Ct. 1548 (1978).

Wilkerson v. Utah, 99 U.S. 130, 25 L.Ed. 345 (1879), similarly held that execution by firing squad is not an unconstitutional method of inflicting the death penalty. The Utah Supreme Court recently affirmed this position. Pierre v. Morris, 607 P.2d 812 (Utah 1980). Andrews v. Morris, 607 P.2d 816 (Utah 1980).

Nevada authorized the death penalty to be administered by lethal gas, as approved sub silentio in Bishop v. State, 95 Nev. 511, 516, 597 P.2d 273, 274 (1979). See also State v. Gee Jon, 46

Nev. 418, 211 Pac. 676 (1923). Shuman has made no showing that the administration of lethal gas is any more painful than either electrocution or death by firing squad. In the absence of legal or empirical evidence to the contrary, it has been and should be concluded that the gas chamber is a constitutional method of administering the death penalty.

11. The death penalty is a justifiable means of achieving legitimate governmental ends and is not excessive.

In Gregg v. Georgia the United States supreme Court said:

"Retribution is no longer the dominate objective of the criminal law," Williams v. New York, 337 U.S. 241, 248, 69 S.Ct. 1079, 1084, 93 L.Ed. 1337 (1949), but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Furman v. Georgia, 408 U.S., at 394-395, 92 S.Ct., at 2806-2807 (Burger, C. J., dissenting); id., at 452-454, 92 S.Ct. at 2835-2836 (Powell, J., dissenting); Powell v. Texas, 392 U.S.,

at 531, 535-536, 88 S.Ct., at 2153, 2155-2156 (plurality opinion). Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." 408 U.S. at 183. (Footnote omitted.)

See also Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); In Re Klemmer; Wilderson v. Utah; H. Roberts v. Louisiana; Spinkellink v. Florida; Bishop v. Nevada; S. Roberts v. Louisiana; and Woodson v. North Carolina.

CONCLUSION

Based upon the foregoing points and authorities, as well as all papers, pleadings, records, documents and other matters on file and to be filed herein, it is hereby respectfully requested that the instant Application for Habeas Corpus be

denied.

DATED this 16th day of March, 1981.

RICHARD H. BRYAN
Attorney General

By: /s/ Brooke A. Nielsen
Brooke A. Nielsen
Deputy Attorney General
Criminal Division

and

By: /s/ Robert C. Manley
Robert C. Manley
Deputy Attorney General
Criminal Division

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CLARIFICATION OF GROUNDS FOR
PETITION FOR WRIT OF HABEAS CORPUS

Filed April 28, 1981

[Caption Omitted in Printing]

Pursuant to stipulation of the parties and by Order of this Court, the Petitioner hereby clarifies "Ground Eleven" of his petition in CIV-R-78-118-ECR, and "Ground Eight" of his petition in CIV-R-78-119-ECR.

GROUND ELEVEN: CIV-R-78-118-ECR

The petition in case number 78-118 challenges Mr. Shuman's 1958 conviction and sentence of life imprisonment without possibility of parole. The sentence was imposed by the trial jury in deprivation of Mr. Shuman's constitutional rights because (a) the sentence was imposed without any guidelines for the jury to consider, and (b) there was no bifurcated hearing.

The United States Supreme Court held

that imposition of the death penalty is unconstitutional unless the sentencing jury is given guidance and direction to assist it in making its decision. Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346 (1972). This rule should be similarly applied to non-capital cases such as Mr. Shuman's 1958 sentence, where the jury decided whether he should receive life in prison with or without the possibility of parole. Without guidelines for the jury to consider, Mr. Shuman's sentence was an arbitrarily and capriciously imposed as was the sentence in Furman v. Georgia, supra.

Second, Mr. Shuman was tried and sentenced by the jury in a single proceeding. Evidence relevant to sentencing was excluded from jury consideration if it was irrelevant to the issue of guilt or innocence. Thus, the jury was denied both guidelines and important evidence to

assist its sentencing deliberations.

The solution to the constitutional requirements of Furman v. Georgia, supra, are (1) guidelines, and (2) bifurcated proceedings.

"in summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted stature that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." Gregg v. Georgia, 428 U.S. 153, 195, 49 L.Ed.2d 859, 887 (1976).

These procedures were absent in Mr. Shuman's 1958 trial and should have been required.

Although the 1958 trial did not immediately result in the imposition of the death penalty, the sentence of life

without possibility of parole directly subjected Mr. Shuman to a mandatory death sentence upon his 1975 conviction for murder. The 1975 death sentence was so directly connected to his 1958 sentence that both must meet the constitutional directives of Furman and its successor decisions.

GROUND EIGHT: CIV-R-78-119-ECR

The Nevada Supreme Court's appellate review of death sentences in general, and Mr. Shuman's 1975 sentence in particular, fails to meet the constitutional standards of Furman v. Georgia, supra. That Court denied Mr. Shuman's appeal from his 1975 conviction and sentence of death. Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978). The decision failed to consider whether Mr. Shuman's sentence was imposed arbitrarily or capriciously; the Furman guidelines have not been satisfied.

The scope of appellate review was a

crucial factor in the United States Supreme Court's approval of Georgia's post-Furman capital punishment law.

"As an important additional safeguard against arbitrariness and caprice, the Georgia . . . Supreme Court . . . is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases . . . Moreover to guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similar situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of Furman. No longer should there be 'no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not'. [Furman v. Georgia] 408 U.S. at 313, 33 L.Ed.2d 346, 92 S.Ct. 2726 (White, J., concurring)." Gregg v. Georgia, supra, at 198.

In addition to the existence of the comprehensive statute, Georgia's Supreme Court has demonstrated meticulous care in following the statute's directives. Id., at 205-206.

Nevada's legislature has ignored the Furman and Gregg standards for appellate review, and has issued no guidelines to the Nevada Supreme Court. The Court has ignored the Furman and Gregg standards for appellate review and has failed to voluntarily provide Mr. Shuman with a constitutional review of his sentence. "The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty." Gregg v. Georgia, supra, at 206. Nevada has no such checks and thus violates Furman v. Georgia, supra.

DATED this 28th day of April, 1981.

Respectfully submitted,

/s/ Martin H. Wiener
MARTIN H. WIENER
Assistant Federal Public
Defender
Attorney for Petitioner

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RETURN

Filed March 16, 1981

[Caption Omitted in Printing]

CHARLES L. WOLFF, JR., Director,
Nevada Department of Prisons, for his
return in this habeas proceedings respect-
fully shows the Court:

1. That he has custody of Petitioner
Raymond Wallace Shuman.

2. That the authority by which he
has and retains custody of Raymond Wallace
Shuman is the Judgment of Conviction filed
June 14, 1958, from the Fifth Judicial
District Court, in and for the County of
Mineral, whereby Petitioner was committed
to the Nevada State Prison for a term of
life imprisonment without the possibility
of parole upon a conviction for the crime
of murder in the first degree and the
Judgment of Conviction which was filed May
12, 1975, from the First Judicial District
Court in and for Carson City, whereby

Raymond Wallace Shuman was committed to the Nevada State Prison for the purpose of the imposition of the death penalty upon a conviction for the offense of capital murder.

3. That exemplified copies of the aforementioned Judgments of Conviction are attached hereto and by reference made a part hereof.

4. That pursuant to 28 U.S.C. 2249, attached hereto are certified copies of the Information and the plea of Petitioner in the 1958 case and the Information, Amended Information and plea of Petitioner in the 1975 case.

DATED this 16th day of March, 1981

/s/ Charles L. Wolff, Jr.
CHARLES L. WOLFF, JR., Director
Nevada Department of Prisons

[Certificate of Service
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IN THE FIRST JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA,
IN AND FOR CARSON CITY

* * * *

THE STATE OF NEVADA, No. 33259
Plaintiff,
vs.
RAYMOND WALLACE SHUMAN,
Defendant.

JUDGMENT OF CONVICTION

RAYMOND WALLACE SHUMAN, the defendant above-named, having been brought before the Court on an Information charging him with the crime of Capital Murder in violation of NRS 200.010 and NRS 200.030, and he having entered a plea of not guilty thereto, and the defendant present with his counsel, DON AIMAR and GARY ARMENTROUT, Deputy State Public Defenders, thereafter having been tried by a jury duly impaneled and sworn on the 9th day of

April, 1975, and the jury having rendered a verdict of guilty on the 13th day of April, 1975;

The defendant having appeared for sentencing in person on the 12th day of May, 1975, with his counsel, DON AIMAR, Deputy State Public Defender, and MICHAEL E. FONDI, District Attorney, and PATRICK WALSH, Deputy Attorney General, having also been present;

The defendant offering no statement in mitigation, and no sufficient cause being shown by the defendant as to why judgment should not be pronounced against him, the Court entered judgment that the defendant was guilty of the crime of Capital Murder, a felony.

THE COURT THEN ORDERED that the defendant be punished by suffering death, said judgment of death to be inflicted by the administration of lethal gas in accordance with the laws of the State of

Nevada, and the execution of the death penalty herein imposed to be had during the week commencing July 20, 1975, and ending July 26, 1975, that period of time being not less than sixty (60) days and not more than ninety (90) days after the entry of judgment.

RAYMOND WALLACE SHUMAN, the defendant, being already in the custody of the Warden of the Nevada State Prison, the Warden or such person as he shall designate for the purpose of carrying into execution the judgment and sentence is hereby ordered to do so.

THE COURT ORDERED that the defendant be remanded to custody in obedience to the aforesaid sentence.

DATED this 12th day of May, 1975.

/s/ Frank Gregory
DISTRICT JUDGE

STATE OF NEVADA)
) ss.
COUNTY OF CARSON CITY)

I, RAY TIDWELL, hereby certify:
That I am the RECORDS OFFICER of the
NEVADA DEPARTMENT OF PRISONS a penal
institution of the State of NEVADA,
situated in the County and State afore-
said; that in my legal custody as such
officer are the original files and records
of persons heretofore committed to said
penal institution; that the

(1) Photograph [not attached], (2)
Fingerprint Record [not attached] and (3)
Commitment attached hereto are copies of
the original records of SHUMAN, RAYMOND W.
#7449, a person heretofore committed to
said penal institution and who served a
term of imprisonment therein; that I have
compared the foregoing and attached copies
with their respective originals now on
file in my office and each thereof con-
tains, and is, a full, true and correct

transcript and copy of its said original.

IN WITNESS WHEREOF, I have hereunto
set my hand this FIRST day of JUNE, A.D.
1979.

/s/ Ray Tidwell

Signature

RECORDS AND IDENTIFICATION OFFICER

Official Title

STATE OF NEVADA)
) ss.
COUNTY OF CARSON CITY)

I, WILLIAM SWACKHAMER, Secretary of
State of the State of NEVADA do hereby
certify that RAY TIDWELL, whose name is
subscribed to the above Certificate, was
at the date thereof, and is now, the
RECORDS OFFICER of the NEVADA DEPARTMENT
OF PRISONS, and is the Legal Keeper and
the officer having the legal custody of
the original records of said NEVADA
DEPARTMENT OF PRISONS; that the said
Certificate is in due form; and that the
signature subscribed thereto is his

genuine signature.

IN WITNESS WHEREOF, I have hereunto
subscribed my name and affixed the Seal of
the State of NEVADA this 1st day of JUNE,
A.D. 1979.

/s/ William Swackhamer
Signature

(SEAL)

Secretary of State of the State of
NEVADA

By _____
Deputy

IN THE DISTRICT COURT OF THE FIFTH
JUDICIAL DISTRICT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF MINERAL
COMMITMENT

The State of Nevada,

To the Sheriff of the County of
Mineral, and the Warden and Officers in
charge of the State Prison of the State of
Nevada, GREETINGS:

WHEREAS RAYMOND WALLACE SHUMAN has
been duly convicted in our District Court
of the crime of MURDER OF THE FIRST DEGREE
and judgment having been pronounced
against him that he be punished by impri-
sonment in the State Prison of the State
of Nevada for the term of REMAINDER OF
LIFE WITHOUT THE POSSIBILITY OF PAROLE
All of which appearing to us of record,
and a certified copy of the judgment being
endorsed hereon and made a part hereof:

Now this is to command you, the said
Sheriff, to safely deliver the said

RAYMOND WALLACE SHUMAN into the custody of the said Warden or any officer in charge of the State Prison of the State of Nevada, forthwith.

And this to command you, the said Warden, or officer in charge of the State Prison of the State of Nevada, to receive from the said Sheriff, the said RAYMOND WALLACE SHUMAN. Convicted and sentenced as aforesaid, and HE the said RAYMOND WALLACE SHUMAN Safely keep and imprison in the said State Prison of the State of Nevada for the term of REMAINDER OF LIFE WITHOUT THE POSSIBILITY OF PAROLE And these presents shall be your authority to do so. HEREIN FAIL NOT.

WITNESS, Hon. PETER BREEN Judge of the said District Court of the Fifth Judicial District at the Court House, in the County of Mineral, this 14th day of June A.D. 1958

WITNESS, my hand and the Seal of said Court, the day and year last above written.

/s/ M. J. Barlow, Clerk

By _____, Deputy Clerk

Filed June 14, 1958

IN THE DISTRICT COURT OF THE FIFTH
JUDICIAL DISTRICT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF MINERAL

THE STATE OF NEVADA,)	CRIMINAL CASE
)	NUMBER 331
Plaintiff,)	
)	
vs.)	
)	
MELVIN LEE ROWLAND)	
and RAYMOND WALLACE)	
SHUMAN,)	
)	
Defendants.)	
)	

JUDGMENT

The Defendant, MELVIN LEE ROWLAND,
being present in Court of this time,
accompanied by his Counsel, Jon R.
Collins, Esquire, and the defendant,
RAYMOND WALLACE SHUMAN, being present in
Court at this time, accompanied by his
Counsel, PAUL A. RICHARDS, Esquire and the
State being represented by the District
Attorney, L. E. BLASDELL, Esquire, the

said defendants appearing for judgment
herein, this being the time heretofore set
for the pronouncing of Judgment.

The Defendants being then informed by
the Court of the filing of an Information
against them on the 31st day of January,
1958, by the District Attorney of Mineral
County, State of Nevada, charging the said
defendants with the crime of Murder
committed as follows: That the said
Melvin Lee Rowland and Raymond Wallace
Shuman, on or about the 11th day of
December, 1957, did at a point on, or
near, U.S. Highway 95, approximately 6 1/2
miles in a Northerly direction from the
town of Schurz, Mineral County, Nevada,
unlawfully kill a human being, to-wit:
Vernon Stallard, with malice aforethought,
by shooting the said Vernon Stallard with
a gun, all of which is contrary to the
form, force and effect of the state in
said cases made and provided, and against

the peace and dignity of the State of Nevada.

And the defendants being further informed by the Court of their arraignment on said charge on the 31st day of January, 1958, and of the giving and entering of their pleas thereto of NOT GUILTY, and of their trial on said charge in this Court, upon which the Jury brought in their Verdicts of Murder in the first degree against each of said defendants, and specifying punishment to consist of imprisonment in the State Prison of the State of Nevada for the remainder of the life of each of the said defendants, without possibility of parole, which said verdicts were duly entered of record.

And the defendants being asked by the Court if they have any legal cause appearing against the pronouncement of judgment, and all and singular the law and the premises being by the Court seen, heard

and considered;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that you the said defendant, MELVIN LEE ROWLAND, are guilty of murder of the first degree as found by the verdict of the Jury, and that in punishment for the said crime that you, the said MELVIN LEE ROWLAND be imprisoned in the State Prison of the State of Nevada at Carson City, Nevada, for the remainder of your life without possibility of parole, and it is ORDERED ADJUDGED AND DECREED that you the said RAYMOND WALLACE SHUMAN are guilty of murder in the first degree as found by the verdict of the Jury, and that in punishment for the said crime, you the said RAYMOND WALLACE SHUMAN be imprisoned in the State Prison of the State of Nevada at Carson City, Nevada, for the remainder of your life, without possibility of parole.

IT IS FURTHER ORDERED, ADJUDGED AND

DECREED that you, the said defendant, be now committed to the Sheriff of Mineral County, State of Nevada, and by him transmitted to the said State Prison, and delivered to the Warden thereof, and that, in execution of this judgment, you, the said defendants be imprisoned and detained in the said State Prison, until this Judgment shall have been fully complied with and satisfied.

DONE IN OPEN COURT IN THE TOWN OF HAWTHORNE, COUNTY OF MINERAL, STATE OF NEVADA, THIS 14th DAY OF JUNE, A.D., 1958.

/s/ Peter Breen
DISTRICT JUDGE

CERTIFICATE OF CLERK

STATE OF NEVADA,)
) ss.
COUNTY OF MINERAL)

I, M. G. BARLOW, County Clerk of Mineral County, State of Nevada, and Ex-Officio Clerk of the District Court of

the Fifth Judicial District of the State of Nevada, in and for the County of Mineral, do hereby certify the foregoing and annexed to be a correct copy of Judgment in Criminal Case Number 331, The State of Nevada, Plaintiff, vs. Melvin Lee Rowland and Raymond Wallace Shuman, Defendants as the same appears on file and of record in my office at Hawthorne. County and State aforesaid.

Attest my hand and seal of said Court this 14th day of June, A.D. 1958

/s/ M. J. Barlow Clerk

Deputy

STATE OF NEVADA)
) ss.
COUNTY OF CARSON CITY)

I, RAY TIDWELL, hereby certify:
That I am the RECORDS OFFICER of the
NEVADA DEPARTMENT OF PRISONS a penal
institution of the State of NEVADA,
situated in the County and State afore-
said; that in my legal custody as such
officer are the original files and records
of persons heretofore committed to said
penal institution; that the

(1) Photograph [not attached], (2)
Fingerprint Record [not attached] and (3)
Commitment attached hereto are copies of
the original records of SHUMAN, RAYMOND W.
#7449, a person heretofore committed to
said penal institution and who served a
term of imprisonment therein; that I have
compared the foregoing and attached copies
with their respective originals now on
file in my office and each thereof con-
tains, and is, a full, true and correct

transcript and copy of its said original.

IN WITNESS WHEREOF, I have hereunto
set my hand this FIRST day of JUNE, A.D.
1979.

/s/ Ray Tidwell

Signature

RECORDS AND IDENTIFICATION OFFICER
Official Title

STATE OF NEVADA)
) ss.
COUNTY OF CARSON CITY)

I, WILLIAM SWACKHAMER, Secretary of
State of the State of NEVADA do hereby
certify that RAY TIDWELL, whose name is
subscribed to the above Certificate, was
at the date thereof, and is now, the
RECORDS OFFICER of the NEVADA DEPARTMENT
OF PRISONS, and is the Legal Keeper and
the officer having the legal custody of
the original records of said NEVADA
DEPARTMENT OF PRISONS; that the said
Certificate is in due form; and that the
signature subscribed thereto is his

genuine signature.

IN WITNESS WHEREOF, I have hereunto
subscribed my name and affixed the Seal of
the State of NEVADA this 1st day of JUNE,
A.D. 1979.

/s/ William Swackhamer
Signature

(SEAL)

Secretary of State of the State of
NEVADA

By _____
Deputy

SUPPLEMENTAL POINTS AND
AUTHORITIES IN OPPOSITION TO
APPLICATION FOR HABEAS CORPUS

Filed September 1, 1981

[Caption Omitted in Printing]

Respondents, by and through counsel,
Richard H. Bryan, Attorney General, submit
the following points and authorities in
opposition to Ground Eleven of the Appli-
cation for Habeas Corpus in Case No.
CIV-R-78-118-ECR and Ground Eight of the
Application for Habeas Corpus in Case No.
CIV-R-78-119-ECR:

I. GROUND ELEVEN: CIV-R-78-118-ECR:

Petitioner has failed to cite any
authority in support of his claim that his
1958 murder conviction is so intimately
connected with the 1975 imposition of the
death sentence, that the standard, of
Furman v. Georgia, 408 U.S. 238 (1972) and
its progeny should be applied to the 1958
conviction.

It is clear that Shuman was

represented by counsel at all critical stages of the 1958 proceeding. See: Points and Authorities in Opposition to Application for Habeas Corpus regarding Shuman's May 12, 1975 conviction, pp. 18-19, Ln. 9-30, 1-3. All other inquiries to the 1958 conviction should be rejected by this Court. To do otherwise would sanction Shuman's improper circumvention of the orderly state procedures for review of his 1958 conviction. See: Greg v. Wyrick, 449 F.Supp. 969 (D. Mo. 1978).

II. GROUND EIGHT: CIV-R-78-119-ECR:

The Nevada Supreme Court, in Shuman v. State, 74 Nev. 265, 578 P.2d 1183 (1978), did consider whether or not the imposition of the death penalty in Shuman's case was arbitrary or capricious.

Under the U.S. Supreme Court cases of Furman v. Georgia, 408 U.S. 238 (1972) and Gregg v. Georgia, 429 U.S. 153 (1976), the imposition of a death sentence is

considered arbitrary and capricious where there is no provision for consideration of the character and record of the individual offender, and the circumstances of the crime. The U.S. Supreme Court does not state in Gregg v. Georgia that appellate review of these specific factors or other factors is a prerequisite to the constitutional imposition of a death sentence. But rather, the U.S. Supreme Court in Gregg v. Georgia stated that such appellate review is "... an important additional safeguard against arbitrariness and caprice"

However, the U.S. Supreme Court has stated in H. Roberts v. Louisiana, 431 U.S. 633 (1977), that the situation of an offender serving a life sentence without the possibility of parole who commits a murder, is a unique situation, saying:

"Only the third category of the Louisiana first-degree murder statute, covering

intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law. [Citations omitted.] 428 U.S. at 334, N.9.

Discussing the above statement the Nevada Supreme Court said:

"Although the Court does not explain the 'unique' problem, we believe it is clear. Unlike all other situations, in which the question presented to the jury is the degree or nature of punishment that should be imposed, the question presented in this instance, if a separate hearing were required, would be whether any effective punishment should be imposed at all upon a prisoner already serving a life sentence without possibility of parole. What 'mitigating circumstances' could be offered that would justify the result that an individual convicted of murder should suffer no practical legal consequences for that deliberate act? It is this circumstance that makes the case

'unique'.

We note that this would also be the result if, as Shuman urges, we were to declare the statute under which he was sentenced unconstitutional. We do not see 'fundamental respect for humanity', Woodson v. North Carolina, 428 U.S. at 304, reflected in the conclusion that the murder of Bejarno should be without effective legal consequences for its perpetrator. In the absence of a clear directive from the United States Supreme Court, we decline to reach such a result." 94 Nev. at 271.

It is clear that the Nevada Supreme Court concluded sub silentio that the Nevada capital punishment law under which Shuman was sentenced automatically takes into account the character and record of the accused, thus, avoiding the arbitrariness or caprice prohibited in Furman v. Georgia. Furthermore, the Nevada Supreme Court was significantly persuaded by the fact that without the death sentence, Shuman, the murderer, would go unpunished. Under these circumstances, the death

sentence has been imposed upon Shuman with due deliberation and in the service of justice.

DATED this 31st day of August, 1981.

RICHARD H. BRYAN
Attorney General

By: /s/ Brooke A. Nielsen
Brooke A. Nielsen
Deputy Attorney General
Criminal Division

[Certificate of Service
Omitted in Printing]

ORDER

Filed March 24, 1982

[Caption Omitted in Printing]

Petitioner, Raymond Wallace Shuman, was convicted after a trial by jury in the state court for murder in the first degree in 1958 and sentenced to prison for life without possibility of parole. While serving that sentence he was again convicted of first degree murder in 1975 and sentenced under Nevada Revised Statute § 200.030 in effect from 1975-1977 which provided, inter alia, mandatory capital punishment for individuals under the sentence of life without possibility of parole.

In July, 1978, Shuman simultaneously filed separate petitions for habeas corpus pursuant to 28 U.S.C. § 2254 in this court attacking the 1958 and 1975 convictions. The state court's warrant for execution of petitioner has been stayed by this court

during the pendency of this proceeding and the two petitions have been consolidated for all purposes by an earlier order of the court.

A. 1958 Conviction

1. Deliberate Bypass.

In general exhaustion of state remedies is required as a prerequisite to consideration of each claim presented in a federal habeas corpus petition. 28 U.S.C. § 2254(b). Pitchess v. Davis, 421 U.S. 482, 95 S.Ct. 1748, 44 L.Ed.2d 317 (1975). The deliberate bypass of the orderly procedure of state courts resulting in the forfeiture of available state court remedies may in some cases act as a bar to federal habeas corpus relief. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); Journigan v. Duffy, 552 F.2d 283 (9th Cir. 1977).

Here, the petitioner did not seek to challenge his 1958 conviction until after

approximately twenty years and after his second conviction for first degree murder which came in 1975. At that time he filed a petition for post-conviction relief in the state court setting forth the identical grounds for relief proffered in the instant petition. The state court dismissed all of the petitioner's claims except for one on the ground that such issues were waived because they could have been raised in a direct appeal but were not. The remaining jurisdictional claim was also subsequently denied. An appeal then taken by petitioner to the Nevada Supreme Court was dismissed.

The respondent herein contends that the instant petition should also be denied because petitioner failed to follow proper state court procedure or offer any excuse therefor.

The standard which should be applied in considering whether constitutional

claims raised in a federal habeas corpus petition are barred because of a procedural default resulting in the inability to have such claims previously considered on the merits in state court is whether or not the petitioner deliberately bypassed the opportunity to raise such claims in the state court. Rienhart v. Brewer, 561 F.2d 126 (8th Cir. 1977); Patterson v. Brown, 393 F.2d 733 (10th Cir. 1968). More specifically, in Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), the Supreme Court stated that the appropriate standard to be applied in determining whether a federal habeas petition had in fact deliberately bypassed orderly procedure of the state courts and in so doing forfeited his state court remedies was:

The classic definition of waiver enunciated in Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461--"an intentional relinquishment or

abandonment of a known right or privilege"--furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits--though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the fact bearing upon the applicant's default.

Of course, the court must indulge every presumption against waiver in a case such as this. In re Kravitz, 488 F.Supp. 38 (M.D. pa. 1979).

Based on the record before it, the Court simply cannot find that a deliberate waiver or bypass of the state court remedies available to petitioner following

his 1958 conviction took place. The strongest indication that such a waiver may have occurred is found in the affidavit of attorney Paul A. Richards who represented Petitioner throughout the 1957-58 proceedings. Attorney Richards states that he felt that under the circumstances of the case a "victory" of sorts was obtained in averting the death penalty for petitioner after the 1958 trial. He further states that the petitioner was then facing additional murder charges in California and that he advised that a direct appeal from the Nevada murder conviction not be taken "... by reason of the impending charge of the Macklin murder in the State of California."

Utilizing the above standard it is clear that the Court could possibly find that petitioner's failure to appeal the 1958 conviction did amount to an intentional bypass of preventment of his

constitutional claims through orderly state appellate procedure. Other than the sparse detail provided in the affidavit of attorney Richards there is no indication as to what information petitioner had following his conviction regarding availability of post-conviction relief. In addition to the above-cited comment by attorney Richards nothing else in the record indicates that murder charges were in fact pending against petitioner in California following petitioner's 1958 conviction or that the apparent failure of the California authorities to prosecute him on such charges had anything to do with petitioner's decision about whether or not to take an appeal and the potential results thereof. Because of the gravity and nature of the rights involved this court cannot find under these circumstances that the record convincingly demonstrates a factual background which

shows a deliberate waiver and bypass of orderly state procedure barring him from seeking federal habeas corpus relief as to his 1958 conviction.

2. State Jurisdiction Over Petitioner.

The first issue regarding petitioner's 1958 murder conviction is whether the State of Nevada had jurisdiction to prosecute Shuman, a non-Indian, for a crime committed on an Indian reservation located within the State of Nevada.

Despite the broad wording of 18 U.S.C. § 1152 which relates to the law governing the punishment of offenses occurring within Indian country, it has been consistently held that crimes committed by non-Indians against non-Indians are subject to state jurisdiction. United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).

3. Right to Speedy Trial.

Petitioner was first charged on December 17, 1975. His trial began on May 26, 1985. Petitioner contends simply that the delay of some five months in bringing him to trial constituted a denial of his constitutionally guaranteed right to a speedy trial.

A five-month delay does not appear patently unreasonable, much less a violation of the Sixth Amendment where, as here, petitioner has failed to even assert prejudice as a result of the delay. The Court need not look further to examine the merits of the claim. United States ex rel. Placek v. Illinois, 546 F.2d 1298 (7th Cir. 1976); Stubbs v. Harris, 480 F.Supp. 523 (S.D. N.Y. 1979). The Court recognizes that a long delay in addition to a request for speedy trial by a defendant, as well as lack of good cause by the government for the delay, may well present an appropriate case for federal habeas

corpus relief. See United States ex rel. Mangiaracina v. Case, 439 F.Supp. 913 (E.D. Pa. 1977). No such showing has been made here.

Other courts have applied the Supreme Court's four factor test set forth in Barker v. Wingo, 407 U.S. 514 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) in determining whether the state court denied petitioner his Sixth Amendment right to a speedy trial in this context. That is: (1) length of delay; (2) reason for delay; (3) defendant's assertion of his right; and (4) prejudice to defendant. Foran v. Metz, 463 F.Supp. 1088 (S.D. N.Y. 1979). In a case such as this where the delay is relatively short (5 months) and petitioner has neither asserted or shown that he was either prejudiced by the short delay or that he made demand for an earlier trial the reason for the delay is irrelevant.

4. Effective Assistance of Counsel.

Petitioner has also alleged that he was denied his constitutional right to effective counsel. To this end petitioner points to several omissions on part of his attorney occurring during the defense of the 1957-58 charges to support his claim. These involve the failure of his attorney to file a pretrial petition for writ of habeas corpus, perfect a direct appeal from the conviction or informing petitioner how to do the same and have petitioner examined by a psychiatrist before trial to determine his mental competence.

The applicable standard for incompetent counsel in the Ninth Circuit is the reasonably competent and effective representation test which is as stated in Rinehart v. Brewer, 561 F.2d 126, (8th Cir. 1977):

"The standard for measuring effective assistance of counsel was articulated in United States v. Easter, 539 F.2d 663, 666 (9th Cir. 1976):

[T]rial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.

In addition, the defendant must have been materially prejudiced in the defense of his case by the actions or inactions of defense counsel. Crismon v. United States, 510 F.2d 356, 358 (8th Cir. 1975)."

In Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) the court states at page 1331:

When the claim of ineffective assistance of counsel rests upon specific acts and omissions of counsel at trial, as it does in this case, relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct."

Petitioner, who has been represented at all times during this proceeding by counsel, has not presented any further support for his claim of incompetent counsel other than the bare allegation in his petition and has not asserted that he

was prejudiced by such alleged ineffective representation. Under these circumstances the Court has no choice but to deny petitioner's claim for relief on this ground which will be conditioned upon the right of petitioner to request reconsideration within 30 days of the date of this order to be submitted together with any supportive evidence and materials. The Court may in such event order that an evidentiary hearing be held.

5. Denial of Severance.

Petitioner was tried at the 1958 murder trial along with his codefendant despite a pretrial motion for severance by his attorney as well as repeated requests for severance made during the trial. At least part of the potential reason for petitioner's request for severance is obvious from the record as apparently both petitioner and his codefendant made out-of-court confessions prior to trial.

In order to prevail on this claim petitioner would have had to show that the trial judge's denial of his severance motion rendered his trial fundamentally unfair as to him in violation of due process. Byrd v. Wainwright, 428 F.2d 1017 (5th Cir. 1970). Again petitioner has made no attempt to make such a showing during these proceedings. In this regard relief as to this claim must be denied with the same condition as to the previous claim.

6. Voluntariness of Confession.

Here again petitioner has chosen to rely solely on the brief allegation in his petition which avers that his confession as to his involvement in the 1957 killing was involuntarily and not freely and intelligently given and that its introduction at trial violated due process. In reply the respondent has pointed out petitioner's failure to support his claim

with any law and/or facts and further shown that the trial judge held a hearing outside of the jury on this issue before ruling that the confession was admissible.

As with the two preceding claims relief on this ground is denied with the previous stated condition.

7. Jury Instructions.

Two of the grounds submitted by petitioner involve separate jury instructions given at the 1958 trial each of which petitioner maintains deprived him of his constitutionally protected right to a fair trial. Jury instruction number 10 used at the 1958 trial referred to petitioner and his codefendant in the plural and, according to petitioner, this instructed the jury to return a verdict for defendants jointly and not individually. Additionally, petitioner maintains that the instruction given to the jury regarding "reasonable doubt" was objectionable

and violated his due process right to a fair trial in that it lessened the state's burden of proof.

The contentions of petitioner in this regard appear to be without merit. Federal habeas corpus relief is not available to set aside a conviction on the basis of an erroneous jury instruction unless the error rendered the trial so fundamentally unfair as to deny due process. Shepard v. Nelson, 432 F.2d 1045, 1046 (9th Cir. 1970).

Even if the above alleged erroneous instructions were given to the jury it seems unlikely that they constituted constitutional error which undermined the fact finding process. See Bustamante v. Cardwell, 497 F.2d 556 (9th Cir. 1974). But inasmuch as the text of the jury instructions in question do not appear in the record before the court petitioner shall, if he desires to further pursue

this ground for relief supplement the record with such instructions and other evidence or supportive materials upon the condition earlier set forth.

8. Sufficiency of the Evidence.

Petitioner contends that the evidence presented at trial was "insubstantial" to find him guilty beyond a reasonable doubt. Ordinarily, the question of whether there was sufficient evidence presented at trial to convict a defendant is not a ground for federal habeas corpus relief. Wilson v. Parratt, 540 F.2d 415 (8th Cir. 1976); Starkey v. Leverette, 462 F.Supp. 749 (M.D. W.Va. 1978).

Petitioner here has failed to show that his case should fall outside that general rule such as has been elsewhere found where the trial record is so void of evidentiary support that a due process issue is raised. Kennedy v. Fogg, 468 F.Supp. 671 (S.C. N.Y. 1979). Relief as

to this claim is thereby denied.

9. Failure of Prosecutor to Provide Pretrial Discovery.

Petitioner again baldly asserts, without any additional support or argument, that his conviction was obtained due to the prosecution's failure to provide him favorable evidence (i.e., Brady material) after a timely request for discovery was made. Where a habeas petitioner does not identify or otherwise at least generally specify what evidence was allegedly wrongfully withheld, no relief is available on those grounds. United States v. Neff, 525 F.2d 361 (8th Cir. 1975). Therefore, relief as to this claim is likewise denied.

10. Invalid Arrest Warrant and Improper Arraignment.

Petitioner contends that his arrest was obtained as a result of an invalid warrant issued without probable cause and

that "he was also not arraigned properly." Because of these alleged improper procedures petitioner alleges that "information was unconstitutionally obtained and used against petitioner at trial."

It is well settled that without more an illegal arrest cannot vitiate a conviction upon application to federal court for a writ of habeas corpus. Pelle v. Reid, 527 F.2d 380 (2nd Cir. 1975). It has also been held that the failure of authorities to properly arraign a defendant does not state grounds for a collateral attack on the subsequent conviction. United States ex rel. Ali v. Deegan, 298 F.Supp. 398 (S.D. N.Y. 1969).

Here, petitioner has even failed to show that his arrest was made upon an invalid warrant much less that evidence was then obtained and improperly used against him at trial.

11. Admission of Codefendant's

Confession.

Petitioner maintains that the out-of-court confession of his codefendant admitted at trial which implicated both defendants in the murder was a denial of his right of confrontation as guaranteed by the Sixth Amendment. The record indicates that a tape recorded confession by petitioner's codefendant was admitted at trial and that the court instructed the jury that the statement could only be considered against his codefendant.

Curiously, under the applicable law it appears that any error which may have arisen from the introduction of the taped confession of petitioner's codefendant is harmless and the right of confrontation is not denied where the petitioner himself has given a confession introduced at trial. United States ex rel. Wilson v. Warden, Illinois State Penitentiary, 600 F.2d 66 (7th Cir. 1979); Felton v. Harris,

482 F.Supp. 448 (S.D. N.Y. 1979); United States ex rel. Catanzaro v. Mancusi, 404 F.2d 296 (2nd Cir. 1968).

Thus, this claim must also be denied subject to reconsideration upon the conditions earlier stated if petitioner is able to show that his own confession was improperly admitted.

The remaining ground submitted by petitioner in support of his application for relief as to his 1958 conviction as clarified is basically that the sentence imposed, life without possibility of parole, should not have been given without use of the guidelines set forth by the Supreme Court to be applied in cases where the death penalty is imposed. There is no authority to support this proposition. It is without merit.

B. 1975 Conviction

On August 27, 1973, Ruben Bejarno, an inmate at the Nevada state Prison who

occupied a cell adjoining that of petitioner, was set afire and burned with a flammable substance. He died at the hospital three days later after stating repeatedly "all over a window" and responding to questions by the nodding of his head.

Petitioner and Bejarno were known to have been fighting over the opening of a window prior to Bejarno's death. After the incident two cans of flammable fluid were found in Bejarno's cell containing petitioner's fingerprints.

1. Dying Declarations.

Petitioner contends that certain statements made by the victim Bejarno after he was burned and admitted at trial under the "dying declaration" exception to the hearsay rule was erroneous. State court rulings on admissibility of evidence may not be questioned in federal habeas corpus proceeding unless it raises a

constitutional question. Chavez v. Dickson, 280 F.2d 727 (9th Cir. 1960).

It is clear that the requirements for a dying declaration were easily met in petitioner's case and no error was committed by the trial judge which is cognizable in this proceeding. See Bell v. Arn, 536 F.2d 123 (6th Cir. 1976); Reese v. Bara, 479 F. Supp. 651 (S.D. N.Y. 1979).

2. Petitioner's Wearing of Prison Clothing During Trial.

Petitioner asserts that he was deprived of the presumption of innocence and thereby denied due process during his 1975 murder trial in that he was forced to wear identifiable prison clothes during the proceedings. The respondent counters that petitioner was not prejudiced in his right to a resumption of innocence by wearing prison clothing at the trial.

Absent exceptional circumstances, a defendant who is forced to stand trial

wearing prison garb is denied due process. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Corley v. Cardwell, 544 F.2d 349 (9th Cir. 1976); Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972). There is nothing in the record, however, to indicate that petitioner was compelled to wear his prison garb during his trial or that any objection was made to such procedure. As stated in Estelle v. Williams, supra, 425 U.S. at 512-513, "... the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." Relief on this claim is thereby denied.

3. Effective Assistance of Counsel.

As with petitioner's attack on his 1958 conviction he also claims that he was denied his Sixth Amendment right to

effective assistance of counsel in the 1975 murder trial. In support of this claim petitioner asserts that his trial attorney failed to alibi witnesses who could have placed him away from the scene of the crime, and that his attorney "only discussed the case with petitioner once for five minutes before trial." As with the situation of petitioner's other ineffective counsel claim no factual or evidentiary support other than the bare allegation has been presented. Thus, petitioner's claim for relief on this ground must also be denied but with the condition previously stated as to several other of the claims in regard to his 1957 murder conviction.

4. Sufficiency of the Evidence;
Reasonable Doubt Instruction.

Petitioner's claim that insufficient evidence was presented at the 1975 trial to prove his guilt is denied for the same

reason the identical claim was rejected in connection with the 1958 conviction.

Similarly, for the same reason that the court rejected the ground regarding a jury instruction defining reasonable doubt as unconstitutional in the 1958 case, the court here denies relief for the same reason but with the same condition earlier stated should petitioner deem it appropriate to present further evidence and support as to this ground.

Since the remaining claims in these consolidated petitions for writ of habeas corpus relate to the imposition of the death penalty the Court deems it appropriate to reserve ruling on such issues until after oral arguments and further briefing by the parties in light of the recent Supreme Court case of Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869 (1982). Such hearing shall be held at the same time as a possible evidentiary hearing on certain

claims herein specified should petitioner make timely request for the same as conditioned by this order and should the Court deem it necessary to hold an evidentiary hearing should petitioner, within 30 days, sufficiently supplement the record so as to justify an evidentiary hearing on any of those matters.

IT IS HEREBY ORDERED that this matter be set for hearing by the Clerk of Court at least 60 days from the date of this order.

IT IS FURTHER ORDERED that the parties shall have 30 days after entry of this order to file additional materials and points and authorities as herein specified should they desire to do so and an additional 20 days thereafter to file written response to any matters raised or presented in such materials.

IT IS FURTHER ORDERED that relief as to all grounds set forth in the petitions

for writ of habeas corpus in actions numbered CIV-E-78-118-ECR and CIV-R-78-119-ECR, as consolidated, be DENIED excepting those grounds expressly reserved for decision by the Court as set forth hereinabove. Such denial is conditional and is subject to reconsideration only as to those claims herein specified.

DATED: March 23, 1982.

/s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE

SUPPLEMENTAL POINTS AND AUTHORITIES
REGARDING EDDINGS V. OKLAHOMA

Filed May 18, 1982

[Caption Omitted in Printing]

Respondents, by and through counsel, RICHARD H. BRYAN, Attorney General of the State of Nevada, submit the following supplemental points and authorities in accordance with the Order of this Court entered herein on March 26, 1982:

SUPPLEMENTAL POINTS AND AUTHORITIES

On January 19, 1982, the United States Supreme Court issued its opinion in the case of Eddings v. Oklahoma, ___ U.S. ___, 104 S.Ct. 869 (1982). In Eddings, the defendant had been convicted in Oklahoma of the first degree murder of a police officer and was sentenced to death upon his plea of nolo contendere. The defendant was 16 years old at the time of the offense, but was tried as an adult. Under Oklahoma law, the defendant in a

death penalty sentencing proceeding may present evidence as to "any mitigating circumstances" and the State may present evidence as to certain specified aggravating circumstances. Following lengthy evidence presented in mitigation regarding the character of the defendant and his family history the court stated,

"I have given you very serious consideration to the youth of the defendant when this particular crime was committed. Should I fail to do this I think I would not be carrying out my duty . . . the court cannot be persuaded entirely by the . . . fact that the youth was 16 years old when this heinous crime was committed nor can the court in following the law, in my opinion, consider the fact of this young man's violent background." 102 S.Ct. at p. 873.

The United States Supreme Court interpreted the trial judge's statement to mean that he had refused to consider, as a mitigating factor, the defendant's personal family history and other evidence presented on his character. The Supreme

Court therefore held as follows:

"In *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Chief Justice Burger riding for the plurality, stated the rule that we apply today; '[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" 102 S.Ct. at 874 (footnote omitted, emphasis original, citation omitted).

The U.S. Supreme Court remanded the case to the state court with the express direction that the court consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. *Eddings*, 102, S.Ct. at 877.

The *Eddings* opinion makes no mention whatsoever of the propriety of a mandatory death sentence where a prisoner serving a life sentence without the possibility of

parole is convicted of first degree murder, but rather, Eddings merely applies the general holding elucidated in Lockett v. Ohio. Respondents should remind the court that the United States Supreme Court in Lockett v. Ohio specifically left open the question which is presented by the instant petition for writ of habeas corpus saying:

"We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence, as, for example, when a prisoner--or escapee--under a life sentence is found guilty of murder. Lockett v. Ohio, 438 U.S. at 604-605, n. 11.

Eddings, which stands for the proposition that a sentencing court should consider all evidence of the personality and character of the accused which is offered in mitigation in a capital case where mitigating and aggravating factors must be weighed against each other, does not address the issue presented herein.

Furthermore, the rationale in Eddings sheds no light on the specific issue to be decided herein.

For all of the above reasons, it is the opinion of Respondents that the case of Eddings v. Oklahoma is entirely distinguishable from the issue under consideration and has no useful application in the instant case.

DATED this 17th day of May, 1982.

RICHARD H. BRYAN
Attorney General

By: /s/ Brooke A. Nielsen
Brooke A. Nielsen
Deputy Attorney General
Criminal Division

[Certificate of Service
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SUPPLEMENTAL POINTS AND
AUTHORITIES IN SUPPORT OF
PETITIONS FOR WRIT OF HABEAS CORPUS

Filed May 27, 1982
[Caption Omitted in Printing]

FACTUAL POSTURE

On May 14, 1980, the Federal Public Defender for the District of Nevada was appointed to represent Petitioner in the above-entitled case. On January 19, 1982, the United States Supreme Court issued its opinion in Eddings v. Oklahoma, 104 S.Ct. 869, 71 L.Ed.2d 1 (1982). On March 23, 1982, this Court rendered its order in the above-entitled actions, specifically reserving decision on the imposition of the death penalty in light of the Eddings decision. Respondents filed supplemental authorities on May 18, 1982.

ISSUE

IS THE AUTOMATIC IMPOSITION OF THE DEATH PENALTY MANDATORILY IMPOSED BECAUSE OF AN ACCUSED'S STATUS WITHOUT ANY INDIVIDUAL CONSIDERATION CONSISTENT WITH THE GROUNDS OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

ARGUMENT

THE MANDATORY DEATH PENALTY IS
UNCONSTITUTIONAL.

Petitioner's death penalty was imposed pursuant to N.R.S. 200.030, which between 1973 and 1977, mandatorily subjected to capital punishment a person convicted of murder while imprisoned for life without the possibility of parole. If petitioner had committed his offense a few months earlier, the jury would have had the discretion to impose an additional life sentence without possibility of parole. N.R.S. 200.030 (1961). If petitioner's trial had occurred a few years later than it did, the jury would similarly have had discretion to impose a less severe penalty than death. In 1977, the statute was amended to make the fact that the defendant had been serving a life term without the possibility of parole one of a number of possible aggravating

circumstances. N.R.S. 200.030(1).

During the time the mandatory statute existed most of its categories were unconstitutional. See Roberts (H) v. Louisiana, 431 U.S. 633, 97 S.Ct. 1993, 57 L.Ed.2d 582 (1977) (murder of a police officer); Smith v. State, 560 P.2d 158 (Nev. 1977) (murder of more than one person as part of a single plan).

Respondent, however, asserts that the statute is constitutional in the limited category of those serving a life sentence without possibility of parole.

The mandatory "lifer" death penalty statute that existed in Nevada between 1973 and 1977 would unquestionably be unconstitutional were it not for a series of footnotes technically holding open the question of employing a mandatory death penalty in "an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence. "Woodson v.

North Carolina, 428 U.S. 280 288 n.7 (1976); accord, Lockett v. Ohio, 438 U.S. 556, 604 n.11 (1978); Roberts (H) II v. Louisiana, 431 U.S. at 637 n.6; Roberts (S) v. Louisiana, 428 U.S. 325, 334 n.9 (1976). Those footnotes hardly can be considered as upholding the constitutionality of a mandatory death penalty statute, as respondent mistakenly suggests. Instead, the logic of those cases and others in an unbroken line of decisions beginning with Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 59 L.Ed.2d 858 (1976) and its progeny, establishes that the mandatory imposition of the death penalty short-circuits substantive and procedural requirements of the Eighth Amendment to the United States Constitution. Even while reserving this particular issue, the court in Lockett stated "we cannot avoid the conclusion that an individual decision is essential in

capital cases." 438 U.S. at 605. See also Woodson v. North Carolina, supra, 428 U.S. at 32 (Rehnquist, dissenting).

This is precisely the point the plurality in Eddings addressed. The trial court in Eddings stated.

"...The court cannot be persuaded entirely by the ... fact that the youth was sixteen years old when this heinous crime was committed. Nor can the Court in following the law, in any opinion, consider the fact of this young man's violent background." 102 S.Ct. at 873, 71 L.Ed.2d at 7 (emphasis added).

In a compelling concurring opinion, Justice O'Connor writes that Lockett compels a remand to the trial court so that the court does not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Eddings v. Oklahoma, supra, 71 L.Ed.2d at 13, citing Lockett v. Ohio, supra, 438 U.S. at 605. Citing Lockett again, Justice O'Connor points out the inherent

infirmities with a mandatory death penalty scheme:

"There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 438 U.S. at 605, cited in Eddings v. Oklahoma, 71 L.Ed.2d at 13. (emphasis original).

Legal scholars uniformly agree that no mandatory death penalty statute is constitutional under the standards established by the Supreme Court. E.g. Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio, and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Cal. L. Rev. 317 323

(1981); Gillers, Deciding Who Dies, 129 V. Pa. L. Rev. 1 (1980); Note, The Constitutionality of the Mandatory Death Penalty for Life-Term Prisoners Who Murder, 55 N.Y.U. L. Rev. 636 (1980).

The invalidity of the mandatory death penalty under the substantive requirements of the Eighth Amendment reflects many of the problems that indict it on procedural grounds as well. The Supreme Court has held regularly and forcefully that individualized sentencing decision, balancing aggravating and mitigating factors, must take place, and that it must be subject to certain guarantees of accuracy such as a separate sentencing hearing, precise statutory standards, and appellate review. E.g., Woodson v. North Carolina, 428 U.S. at 302-305; Lockett v. Ohio, supra. These procedural requirements seek to assure a "particularized consideration of the character and record of each convicted

defendant before the imposition upon him of a sentence of death," and that such consideration is not "arbitrary and wanton" but instead is confined by "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. at 303.

As reiterated in Eddings v. Oklahoma, the first procedural requirement is individualized consideration. In striking down the mandatory death penalty in Woodson, the Court explained the necessity for such consideration:

"A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a

faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." 428 U.S. at 304.

The court held that "consideration of the character and record of the individual offender and the circumstances of the particular offense [is] a constitutionally indispensable part of the process of inflicting the penalty of death." Id. This proposition, established by a plurality of the Court in Woodson, and applied in many cases since, was explicitly adopted by a majority of the court in Eddings v. Oklahoma, supra. There the Court summarized its prior decisions as prohibiting mandatory death sentencing because "the Eighth Amendment required that the individual be given his due." Id. at 875.

The Supreme Court has concluded in every case to date that the requirement of "particularized consideration" is not satisfied by either the broadest or the

narrowest of mandatory statutes, and is entrenched upon any limitation on presentation of mitigating circumstances to the sentencer. E.g., Roberts (S) v. Louisiana, 428 U.S. at 333 (referring to the "futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense"); Woodson v. North Carolina, supra, at 305; Lockett v. Ohio, supra at 604; Eddings v.

Oklahoma, supra at 875. The Nevada statute violates the Eighth Amendment unless there is no possibility in any conceivable case of mitigating circumstances warranting a lesser sentence.

The test is not met in this case. First, the pertinent statutory classification is overbroad. Persons serving life sentences without the possibility of parole include those convicted of willful, premeditated murder as well as persons convicted

under a variety of felony murder classifications. Such persons do not comprise a homogeneous class. Shuman himself, for example, was not the triggerman in the 1958 murder, and his intent to kill was not necessarily established by the conviction for felony murder in the course of a burglary. Further, he was not allowed to present evidence of mitigating factors in 1958 or 1975, and thus respondent cannot argue that the mitigating factors in his particular case would, beyond a reasonable doubt, have been outweighed by aggravating factors.

The mere fact that Shuman was serving a life sentence does not necessarily outweigh possible mitigating factors. As the court stated in Woodson, each defendant is unique, and a mandatory statute results in "blind infliction" of death of a "faceless, undifferentiated mass" 428 U.S. at 304. Applying the Woodson analysis in

Roberts (H) v. Louisiana, supra, the majority held unconstitutional a statute mandatorily imposing the death penalty for premeditated murder of a police officer. The Court specifically held that where there is even a possibility of significant mitigating factors, the sentencer must be allowed to consider them. 431 U.S. at 537.

The question addressed in Eddings, then, is not whether petitioner deserves to die, which the sentencing authority will decide, but whether a sentencing authority would ever give a lesser penalty if allowed to consider any mitigating factors. The fact that someone has been involved in a prior homicide is certainly an aggravating factor, but it, in and of itself, is not so inherently compelling that it would always outweigh any combination of possible mitigating factors, nor is it necessarily a more compelling aggravating circumstance than knowingly murdering a police officer

(Roberts v. Louisiana, 431 U.S. 633 (1977)) or knowingly murdering more than one person (Smith v. State, 560 P.2d 158 (Nev. 1977)). Indeed, it is imply irrational to think that a person who commits a murder fifteen years after having been involved in (but not necessarily directly responsible for) a felony murder is more deserving of death than someone who murders two people in separate incidents but does not happen to be serving a life sentence at the time of the second.

Consequently, under Eddings, petitioner is entitled to a remand for an individualized consideration of the relevant factors. In his case, petitioner might well have shown his prior record while imprisoned and his prospects for rehabilitation, his level of intelligence, his difficult family history, the violent and distorting nature of life in the Nevada penitentiary, extreme emotional disturbance

arising from the dispute that led to the fellow inmate's death and from the immediate conditions of imprisonment. Eddings v. Oklahoma, 102 S.Ct. at 876-77.

DATED: This 27th day of May, 1982.

Respectfully submitted,

N. Patrick Flanagan, III
N. PATRICK FLANAGAN, III
Asst. Federal Public Defender
Counsel for Petitioner

[Certificate of Mailing
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PETITIONER'S BRIEF

JAN 14 1987

JOSEPH F. SPANIOLO, JR.
CLERK

No. 86-246

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE SUMNER, Director, Nevada Department of Prisons,
BRIAN McKAY, Attorney General of Nevada,
Petitioners,

v.

RAYMOND WALLACE SHUMAN,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a mandatory death sentence for murder committed by a prisoner serving a sentence of life imprisonment without possibility of parole violates the Eighth and Fourteenth Amendments to the United States Constitution.

LIST OF PARTIES

The petitioners are George Sumner, director of the Nevada Department of Prisons and Brian McKay, Attorney General of Nevada. The respondent is Raymond Wallace Shuman.

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No. 86-246

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE SUMNER, Director, Nevada
Department of Prisons, BRIAN McKAY,
Attorney General of Nevada,

Petitioners,

v.

RAYMOND WALLACE SHUMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals
(Pet. App. A., pp. 1a-33a) is reported at
791 F.2d 788. The opinion of the district
court (Pet. App. B., pp. 34a-53a) is
reported at 571 F.Supp. 213.

JURISDICTION

The decision of the court of appeals (Pet. App. A, pp. 1a-22a) was entered June 12, 1986. The petition for a writ of certiorari was filed on July 30, 1986 and was granted on November 10, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT

In 1958, Raymond Wallace Shuman was convicted of the first degree murder of Vernon Stallard in Yerington, Nevada. Shuman was sentenced to life in prison without the possibility of parole. In 1973, while still serving his murder sentence, Shuman doused fellow inmate Ruben Bejarno with lighter fluid and ignited Bejarno. Bejarno died three days later from the burns which covered over ninety percent of his body. Thereafter, in 1975, Shuman was convicted of capital murder and received a mandatory death

sentence. Shuman appealed his 1975 conviction and mandatory death sentence to the Nevada Supreme Court. The Nevada Supreme Court affirmed his conviction in an opinion dated May 17, 1978, which specifically upholds the constitutionality of the mandatory death sentence. Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978). (Pet. App. D., pp. 37a-51a).

Respondent Shuman filed two petitions for writ of habeas corpus in the district court under 28 U.S.C. § 2254 in July 1978. These petitions challenged Shuman's 1958 and 1975 convictions for murder, respectively. The petitions were consolidated by the district court.

Following answer and additional briefing by both parties, the district court entered an order on March 29, 1982 denying relief as to certain grounds contained in the consolidated petitions, and providing for an evidentiary hearing

and further briefing on other grounds (Joint Appendix).

An evidentiary hearing was held on July 8, 1983, in the district court. The evidence presented primarily concerned the admission of Shuman and his co-defendant's confessions at the 1958 trial.

Following this hearing, the district court order granting habeas relief as entered on August 18, 1983. (Pet. App. B., pp.22a-33a). The district court ruled against Shuman on all grounds with the exception of the constitutionality of the mandatory death sentence which Shuman had received upon being convicted of capital murder in 1975. The district court held that the mandatory death sentence given to respondent Shuman violates the eighth and fourteenth amendments of the United States Constitution. Id. pp. 32a-33a.

Petitioners filed a timely appeal from the decision of the district court.

Shuman filed a cross-appeal from the decision. Oral argument occurred on February 15, 1985, before a panel of three justices of the appellate court.

The opinion of the court of appeals, affirming the district court, was filed June 12, 1986. (Pet. App. A, pp. 1a-21a). The appellate court held, inter alia, that the section of Nevada law applying a mandatory death sentence to a person who is convicted of murder committed while serving a sentence of life imprisonment without possibility of parole violated the eighth and fourteenth amendments to the United States Constitution. Id. p. 17a. Petitioners seek certiorari relief on this issue alone.

SUMMARY OF ARGUMENT

Raymond Wallace Shuman brutally murdered fellow inmate Ruben Bejarno in 1973 by igniting Bejarno with lighter fluid. Shuman v. State, 94 Nev. 265, 578

P.2d 1183 (1978). (Pet. App. D, pp. 37a-51a). At the time of the murder, Shuman was serving a life sentence without the possibility of parole for a prior murder. Shuman received a mandatory death sentence as provided in Nev. Rev. Stat. § 200.030 (1973, Statutes of Nevada, ch. 798 § 5, at pp. 1803-1804). Pet. App. C, pp. 52a-58a.

The death penalty is a constitutional punishment where it is imposed in a non-arbitrary and non-discriminatory fashion, following due consideration of the character and record of the accused, as well as the circumstances of the offense. Lockett v. Ohio, 438 U.S. 586 (1978). This Court has specifically left unanswered the question of the constitutionality of a mandatory death sentence for murder committed by a prisoner serving a life sentence. Id. at 602 N. 11; Roberts (Harry) v. Louisiana, 431 U.S.

633, at 637 n. 5 at 292-93 n. 25 (1976).

Shuman's character and record, and the circumstances of the offense have been appropriately considered under Nev. Rev. Stat. § 200.030. Shuman's character and record had been judicially determined to be such that he should never be a member of free society again. Prior to the killing of Bejarno, Shuman had already demonstrated his utter disregard for human life by the murder of Vernon Stallard. Shuman's conviction in 1975 followed a fair trial where the jury considered all evidence presented by the defense and concluded that Shuman had maliciously killed a fellow human being, without justification, mitigation or excuse.

The Nevada Legislature acted within its powers as the elected representatives of the people when it enacted a mandatory death sentence for murder committed by a prisoner already serving a sentence of

life without the possibility of parole. This statute is presumed valid and the presumption of validity has not been overcome by respondent. Gregg v. Georgia, 428 U.S. 153, at 175 (1976).

Only a mandatory death sentence will provide deterrence and retribution in cases of this kind. The Nevada Legislature properly determined that the mandatory death sentence was necessary for the protection of the men and women living and working within the walls of the Nevada State Prison.

ARGUMENT

Almost fifteen (15) years ago in Furman v. Georgia, 408 U.S. 238 (1972), this Court, in a 5 to 4 decision, held that the death penalties existing in the state jurisdictions were invalid. Each justice authored a separate opinion expressing various reasons for concurring with or dissenting from the per curiam

decision. Justices Brennan and Marshall concluded that the death penalty was totally prohibited by the eighth amendment. Id., at 305, 370-74. Justices Douglas, Stewart and White essentially stated that the death penalty was being applied in an arbitrary and discriminatory fashion because of the total discretion given to juries in deciding whether or not to impose the death penalty. It is important to note that Justice Douglas suggested that mandatory death sentences might be constitutional. Id. at 256-57, 309-10, 313-14.

The majority of the states reenacted a death penalty law which either provided a mandatory death sentence for various categories of crimes, or established guidelines for the jury or court to follow in considering the death penalty. Since Furman, this Court has upheld state death penalty statutes which provide for a

separate penalty phase of the trial wherein the trier of fact considers evidence both in aggravation and mitigation of the death penalty, and has rejected various mandatory death sentence laws. See Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). Although the Court has struck down other mandatory death sentences, the Court has reserved from its rulings against mandatory death penalties the case of a mandatory death sentence for a murder committed by a prisoner serving a life sentence. Woodson v. North Carolina, 428 U.S. 280, (1976); Roberts (Harry) v. Louisiana, 431 U.S. 633 at 637 n. 5 (1977); Lockett v. Ohio, 438 U.S. 586, at 602 n. 11 (1978). This issue remains undecided today and although it is clear that this issue has been left open by the Court, the opinions of the Court since Furman have not given specific

guidance to resolve this issue.

Therefore, the resolution of this issue requires an analysis of the basic requirements of the United States Constitution which must be satisfied prior to the imposition of the death penalty as those requirements have been interpreted by the Court.

In Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), a 5 to 4 decision, the three-judge plurality, consisting of Justices Stewart, Powell and Stevens, concluded that the eighth and fourteenth amendments are violated by a mandatory penalty, because of the lack of consideration for the character and record of the accused, as well as the individual circumstances of the offense. Again, in Woodson, the plurality concludes that, "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the

character and record of the individual offender and the circumstances of the particular offense" Woodson, 428 U.S. at 304 (citations omitted). See also Roberts (Stanislaus), 428 U.S. at 333-36. This requirement was re-expressed in Roberts (Harry) v. Louisiana, 431 U.S. 633, at 636-37.

In Lockett v. Ohio, 438 U.S. 586 (1978) the Court struck down a death penalty law which limited the mitigating circumstances which could be considered by the jury. The judgment of the Chief Justice was concurred in by Justices Stewart, Powell and Stevens, with Justices White and Blackmun concurring on narrower grounds. The Court held that the eighth and fourteenth amendments require consideration of, "as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a

basis for a sentence less than death. Id., at 604. The issue in this case was expressly reserved from the above-quoted language by the Court. Id. Thus, it appears that it is individualized concern for the character and record of the accused, and consideration of the circumstances of the offense which are the hallmarks of a valid death penalty. However, this Court has never ruled that only the bifurcated procedure which is now commonly followed, satisfies the constitutionally required consideration of the individual record and character of the offender, as well as circumstances of the offense.

Nevada's mandatory death sentence, which was passed in by the Nevada Legislature in 1973 (Pet. App. C, pp. 54a-58a) and applied to Shuman, was a very narrowly drawn statute which by legislative definition considered Shuman's character and

record and circumstances of the offense, as required by the United States Constitution. The issue before the Court, therefore, is whether Nevada's law, as applied to Shuman, satisfied the constitutional requirement of individualized consideration. In Point I of this brief we shall show that Nevada's mandatory death penalty law, as it existed at the time of Shuman's conviction for the murder of Ruben Bejarno, did not violate the eighth and fourteenth amendments and gave due consideration to Shuman's character and record, as well as the circumstances of the offense. In Point II of the brief we shall demonstrate the misinterpretation of Eddings v. Oklahoma, 455 U.S. 104 (1982) by both the appellate and district courts. Finally, in Point III, respondents argue that Nevada's death penalty as applied to Shuman, was both a constitutional and necessary deterrent to the crime of murder

committed by a prisoner who is already serving a sentence of life imprisonment without the possibility of parole.

I.

THE EIGHTH AND FOURTEENTH AMENDMENTS DO NOT PROHIBIT A MANDATORY DEATH SENTENCE FOR A PRISONER WHO COMMITS MURDER WHILE HE IS SERVING A LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE.

A. Nevada's Mandatory Death Sentence, as it Applied to Shuman, Gave Sufficient Consideration to Character and Record, as well as the Circumstances of the Offense.

Shuman's argument is essentially that in order for any death penalty statute to be constitutional it must provide for the admission of "any and all mitigating circumstances." Eddings v. Oklahoma, 455 U.S. 104, at 113-17. (1982). This Court has never held that "any and all mitigating circumstances" must be admitted in every case where the death penalty is a possible sentence.

Shuman argues that Nev.Rev.Stat. § 200.030 as it existed between 1973-1977

was unconstitutional and would unquestionably have been found so except for the "technicality" which held open the question of mandatory sentences in the extremely narrow category of homicides, such as murder by a prisoner serving a life sentence. Woodson v. North Carolina, 428 U.S. 280, 288 n. 7 (1976). That which Shuman refers to as a "technicality" was hardly a judicial oversight. While the reservation of this issue does not equate with endorsement, neither does it equate with judicial disapproval. The repeated reservation of the issue is an indication that a murder committed by a prisoner serving a life sentence without the possibility of parole is the unique case where the defendant does not have the right to present "any and all mitigating circumstances."

In striking down Northern Carolina's mandatory statute for all first degree

murders, the Court in Woodson v. North Carolina, 428 U.S. 280 (1976), was careful to note:

This case does not involve a mandatory death penalty statute limited to an extremely narrow category of homicide, such as murder by a prisoner serving a life sentence, defined in large part in terms of the character or record of the offender.

Id. at 287 n. 7 (emphasis added).

Footnote 25 of the Woodson opinion reiterates that:

We have no occasion in this case to examine the constitutionality of mandatory death sentence statutes applicable to prisoners serving life sentences.

Id. at 292-293.

In Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976), the Court also struck down Louisiana's statutes which provided a mandatory death penalty for more narrow categories of murder. In holding that the statute as a whole was not sufficiently

narrow, the Court was careful to point out that:

Only a third category of the Louisiana first degree murder statute, covering intentional killing by a person serving a life sentence or by a person previously convicted of an unrelated murder, defines the capital crime at least in significant part in terms of the character or record of the individual offender. Although even this narrow category does not permit the jury to consider possible mitigating factors, a prisoner serving a life sentence presents a unique problem that may justify such a law. See Gregg v. Georgia, ante, at 186; Woodson v. North Carolina, ante, at 287, n. 7.

Id. at 334, n. 9 (joint plurality opinion of Stewart, Powell and Stevens, J.J.).

In striking down a mandatory death penalty for first degree murder of a police officer, the Court was careful once again to make it clear that, "We reserve again the question whether or in what circumstances mandatory death sentence statutes may be constitutionally applied

to prisoners serving life sentences . . ."

Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 n. 5 (1977) (per curiam).

Therefore, each time this Court has addressed the subject of mandatory death penalty statutes it has pointedly underscored the distinction between all other mandatory statutes and provisions such as Nev.Rev.Stat. § 200.030 which are narrowly limited to the special problem of murder by an inmate serving a life sentence. In consistently reserving its judgment on statutes like Nev.Rev.Stat. § 200.030, this Court has reaffirmed the presumption of validity which applies to Nev.Rev.Stat. § 200.030.

So impressed with the unique position of this type of statute has the Court been that it has referred to it in cases not even involving mandatory statutes. Striking down limitations on consideration of mitigating circumstances in Lockett v.

Ohio, 438 U.S. 586 (1978), the Court limited its holding with this significant language:

We conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,¹¹ not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . .

¹¹ We express no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner--or escapee--under a life sentence is found guilty of murder. See Roberts (Harry) v. Louisiana, 431 U.S. 633, 637, n. 5 (1977).

Id. at 604 & n. 11 (emphasis added and deleted; one footnote omitted).

Nor have those opinions been the only ones to signal the constitutionality of statutes like Nev.Rev.Stat. § 200.030. In Gregg v. Georgia, 428 U.S. 153 (1976), the

Court pointedly noted that, "there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate." Id. at 186 (joint plurality opinion of Stewart, Powell and Stevens, J.J.) (footnote omitted). See also Furman v. Georgia, 408 U.S. 238, 307 (1972) (concurring opinion of Stewart, J.) (noting that a statute ordaining the death penalty for a life term prisoner who commits murder would leave only the question whether capital punishment is unconstitutional for all crimes and under all circumstances).

No member of the Court has ever rescinded the language quoted hereinabove. The consistent repetition of this language imports more than merely leaving the question open. As the Eleventh Circuit has recently recognized, this language:

. . . implies that mandatory death penalty statutes applied to an extremely narrow category

of crimes defined in large part in terms of the offender's character or record may be constitutionally permissible.

Moore v. Balkcom, 716 F.2d 1511, 1523 (11th Cir. 1983), n. 12, citing Woodson, supra.

Since that implication has been clearly enunciated in separate Supreme Court opinions, a decision upholding Nev.Rev.Stat. § 200.030 is called for. This is particularly apparent when the presumption of validity and heavy burden resting on one who would have a statute struck down are considered.

Nev.Rev.Stat. § 200.030 was so drafted that individualized consideration is built into the definition of the capital offense. No one could be convicted of this very narrow capital offense unless he was already serving a sentence of life imprisonment without possibility of parole. Review of Nevada law, in the

relevant time period, reveals only a few categories of offenders who were subject to life sentences without the possibility of parole. For example, only first degree kidnappers who had inflicted substantial bodily harm on their victims faced a sentence of life with or without the possibility of parole. See 1973 Nev. Stat., Ch. 798, §§ 5-8, pp. 1804-1805. Only a rapist who had inflicted substantial bodily harm on the victim faced life in prison with or without the possibility of parole. Id. p. 1805. A criminal defendant convicted of battery faced life in prison with or without the possibility of parole only where substantial bodily harm to the victim had been caused. Id. Nevada's law prohibiting dueling, Nevada Revised Statute 200.410 (1973), provided for a conviction of first degree murder where the injured party dies within a year and a day of the duel. Also, the sentence

for first degree murder at the time was life with or without the possibility of parole. Id. p. 1804. Finally, those criminal defendants who were principals in the above crimes could also have received similar sentences of life with or without the possibility of parole. See Nevada Rev. Stat. § 194.020.

Respondent has argued incorrectly that Nevada's habitual criminal statute provided for a life sentence without the possibility of parole for any offender with the requisite number of prior convictions. Resp. Brief in Opposition, p. 5.

Respondent makes reference to the Nevada habitual criminal statute which is codified as Nevada Revised Statute 207.010(2). However, at the time of Respondent Shuman's conviction, that statute did not provide for life sentences without the possibility of parole based

upon multiple prior felonies. Nev. Rev. Stat. § 207.010(2) provided in pertinent part as follows:

Every person convicted in this state of any crime of which fraud or intent to fraud is an element, or of petit larceny, or of any felony, who shall previously have been three times convicted, whether in this state or elsewhere of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state prison for life . . .

As amended 1971 Nev. Stat., Ch. 123, § 1, p. 173, subsequently amended 1977 Nev. Stat., Ch. 193, p. 360 (emphasis added).

Under Nevada law when a statute fails to specify whether or not a sentence is with or without parole, the sentence is to be served with the possibility of parole. See Spillers v. State, 84 Nev. 23, 32, 436

P.2d 18, 23 (1968) (the possibility of parole is not precluded unless the legislature has expressly granted that authority). Thus, respondent has incorrectly argued to this Court that non-violent offenders could be sentenced to life without the possibility of parole at the time of Shuman's conviction and sentence.

This review of Nevada law supports petitioners' argument that the mandatory death provision applied to Shuman is a narrowly drawn statute which significantly defines the character of the accused. Each of those persons incarcerated for life without the possibility of parole who then commits a murder in prison, is already a criminal defendant who has committed one of the worst crimes known to this society. Only first degree murderers, first degree kidnappers, rapists or defendants who have committed battery with intent to commit sexual assault, and only

where extreme injury or death has been caused to the victim, were subject to mandatory death under Nevada law if those offenders had received the sentence of life without the possibility for their prior offense. This is a very limited group of criminal defendants. In each case, the court or the jury has previously decided that the character of the defendant and the severity of his prior offenses are such that he should never again be a free member of society. This criminal offender must then commit the most violent and heinous crime known to this society--the murder of a fellow human being, before he or she would be subject to the mandatory death penalty.

Under Nev. Rev. Stat. § 200.030(1)(b) the offense of maliciously killing is by its very terms defined so as to consider the character of the offender as well as the egregiousness of the offense. The

fact that the jury must determine whether or not the killing was malicious in itself demands, to a significant degree, analysis of character of the offender. This is so because the jury, by determining that Shuman acted with malice aforethought, was required to find that he had a wanton disregard for human life. Nev. Rev. Stat. §§ 200.010 and NRS 200.020. The resolution of the requisite intent, operates to define, to a great degree, the character of the murderer himself.

Secondly, his character is defined as a person who is incarcerated. The statute further defines the character of the accused as an inmate who is serving a life sentence. The sentence must be one that is without the possibility of parole. Finally, the accused, as just described, kills another human being while the accused is incarcerated, and the accused is convicted of that crime. Additionally,

the circumstances of the offense have been duly considered by the jury in reaching the guilty verdict. Thus, it is submitted that our narrowly drawn, mandatory capital punishment statute for murder by an inmate serving a life term without possibility of parole does not carry the vice discussed by the plurality opinion in Woodson concerning mandatory death statutes in general. It is hard to visualize any capital statute which could draw so finite an offense so as to consider both the character of the offender and the circumstances of the offense. The elements which had to exist prior to the application of the mandatory death sentence to Shuman, define his character, record and the circumstances of his offense in every meaningful sense of those terms. There is nothing left to consider, because Shuman cannot seriously argue that he has a good character or a good record or that any

circumstances mitigate the offense (Shuman ignited his victim with lighter fluid after an argument over a window, Shuman v. State, 94 Nev. 265, 578 P.2d 1183 (1978)).

B. Nevada's Mandatory Death Penalty is Presumed to be Valid and that Presumption of Validity has not been Overcome by Respondent.

Nev.Rev.Stat. § 200.030(1)(b) (hereinafter "Nev.Rev.Stat. § 200.030") is presumed to be valid. Shuman has failed to overcome this presumption of validity. As this Court reminded itself and the lower courts in Gregg v. Georgia, 428 U.S. 153, at 174 (1976), when the Court said: "[T]he requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts" (joint opinion of Stewart, Powell, and Stevens, J.J.). The Court went on to say that:

. . . in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we

presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhuman or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Id. at 175 (emphasis added). See also Parham v. Hughes, 441 U.S. 347, 351 (1979) (plurality opinion); Flemming v. Nestor, 363 U.S. 603, 617 (1960); Spencer v. Texas, 385 U.S. 554, 569 (1967) (concurring opinion of Stewart, J.); Rummel v. Estelle, 445 U.S. 263, 285 (1980) (concurring opinion of Stewart, J.); Johnson v. Louisiana, 406 U.S. 356, 365-366 (1972) (concurring opinion of Blackmun, J.); Clement v. Flashing, 457 U.S. 957, 973 (1982) (plurality opinion); California v. Ramos, 463 U.S. 992, (1983).

Justice Blackmun in his dissent in Furman v. Georgia, 408 U.S. 238 (1972), noted that:

We should not allow our preferences as to the wisdom of legislative . . . action, or our distaste for such action, to guide our judicial decisions in cases such as these. The temptations to cross that policy line are very great.

Id. at 413.

It is the State's position that the appellate and district court herein crossed that "policy line" described by Justice Blackmun in Furman, by misapplying the import of Eddings v. Oklahoma, supra, and finding that Nev.Rev.Stat. § 200.030 violated Shuman's eighth and fourteenth amendment rights. The question to be answered in the instant case is not whether mandatory death sentences are wise or whether the courts agree with the legislative action, but rather, the issue simply is whether or not Nev.Rev.Stat. § 200.030 is constitutional.

In Gregg, the Court further noted that special deference must be given to

the decision of the state legislature when it establishes a criminal punishment, for this is especially a question of legislative policy. Gregg v. Georgia, 428 U.S. 153, at 174. Applying this principal to its consideration of Georgia's revised death penalty statute, the Court in Gregg concluded that the death penalty was not per se unconstitutional and that it could be inflicted so long as it has been imposed in a non-arbitrary fashion. Id. at pp. 186-187, 206-207.

Respondent has failed to overcome the presumption of validity which the Nevada law enjoys, because the law satisfies all tests by which its validity is to be judged. These tests may be best evaluated by reference to the standards set forth in the Gregg plurality opinion, which tied the constitutional prohibition against cruel and unusual punishments to "evolving standards of decency that mark the

progress of a maturing society." Gregg v. Georgia, supra, 428 U.S. at 173, citing Trop v. Dulles, 356 U.S. 88 (1958). The eighth amendment standard is accordingly gauged by two criteria: (a) objective indicia reflecting the public attitude towards, and acceptance of, a given sanction; and (b) whether the penalty accords with the "dignity of man". The concept of comporting with the "dignity of man" was defined in Gregg as requiring, at a minimum, that the selected punishment not be "excessive". Id. at 173. It is urged that mandatory capital punishment for the malicious killing of another human being by an inmate serving a life sentence without possibility of parole is both widely accepted and is not excessive; accordingly, it is not violative of the federal Constitution.

In Gregg v. Georgia, supra, 428 U.S. at 181, the Court noted that the sentence

of death for the crime of murder was a sanction that had been widely accepted by the general public. However, in Woodson v. North Carolina, 428 U.S. 280, 288-301 (1976), the plurality opinion stated that the mandatory punishment of death was not so accepted. Yet the plurality opinions in Woodson at 292-293, n. 25, and Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 333-334, n. 9 (1976), also held open the issue of whether certain very narrowly drawn mandatory death sentences, such as for intentional murder by an inmate serving a life sentence, or by a person previously convicted of an unrelated murder, might be constitutional.

The Gregg plurality opinion, in discussing objective indicia concerning the general public support for the death penalty for the crime of murder, noted that since Furman, infra, was decided in 1972, at least 35 states and the Congress

of the United States had enacted legislation reinstating the death penalty. Gregg v. Georgia, supra, 428 U.S. at 179-180.

As the Court in Gregg concluded:

. . . all of the post-Furman statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

Id. at 180-81.

Thus, it is urged that in light of present-day indicia of wide public support for this sanction, there should be no constitutional bar to a legislature on its own responsibility finding it necessary to enact a mandatory death sentence for the crime of malicious killing of another human being by a prisoner serving a life term without possibility of parole.

Gregg further held that for a capital penalty to pass constitutional muster under "evolving standards of decency," not only must objective indicia reflect the public attitude towards a given sanction

as positive, but the penalty must also accord with the "dignity of man." In order to comport with the dignity of man, the punishment must not be "excessive." For a punishment not to be excessive in the abstract at the least, (a) the penalty must not involve the unnecessary and wanton infliction of pain and (b) the punishment must not be grossly out of proportion to the severity of the crime. Gregg v. Georgia, supra, 428 U.S. at 173.

The Gregg plurality opinion then noted that the death penalty for the crime of murder accorded with the dignity of man because it contained social justification in that it served two principle social purposes: "Retribution and deterrence of capital crimes by prospective offenders." Id. at 183. Consideration of these two social functions indicates that a mandatory death sentence for the malicious killing of a human being by an inmate

serving a life sentence without possibility of parole is not deprecatory to the dignity of man. Id. at 182-187.

In the absence of a mandatory penalty for this crime a life prisoner such as Shuman, could be effectively unpunished for the calculated murder of a fellow human being. Were a sentence other than death available in this situation then both retribution and deterrence would be ignored.

Regarding the deterrent effect of the death penalty, the Court in Gregg stated:

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. [footnote omitted.] The results simply have been inconclusive Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, [footnote omitted] there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that

there are murderers, such as those who act in passion, for whom the threat of death has little or no effect. But for many others, the death penalty undoubtedly is a significant deterrent.

Id. at 185.

It is respectfully urged that the Legislature of the State of Nevada has acted well within its powers in finding that the imposition of a mandatory death penalty is necessary to deter inmates serving life terms without possibility of parole from maliciously killing again. It would be "deprecatory to the dignity of man" to allow the cruel murder of Ruben Bejarno to go effectively unpunished. Such a result can only invite future unlawful activity within the walls of the Nevada State Prison in Carson City, Nevada.

II. THE APPELLATE AND DISTRICT COURTS
MISINTERPRETED EDDINGS V. OKLAHOMA IN
REVERSING SHUMAN'S DEATH SENTENCE.

On January 19, 1982, the Court issued its opinion in the case of Eddings v. Oklahoma, 455 U.S. 104, (1982). In Eddings, the defendant had been convicted in Oklahoma of the first degree murder of a police officer and was sentenced to death upon his plea of nolo contendere. The defendant was 16 years old at the time of the offense, but was tried as an adult. Under Oklahoma law, the defendant in a death penalty sentencing proceeding may present evidence as to "any mitigating circumstances" and the State may present evidence as to certain specified aggravating circumstances. Following lengthy evidence presented in mitigation regarding the character of the defendant and his family history the Court stated,

I have given very serious consideration to the youth of the defendant when this

particular crime was committed. Should I fail to do this I think I would not be carrying out my duty . . . the court cannot be persuaded entirely by the . . . fact that the youth was 16 years old when this heinous crime was committed nor can the court in following the law, in my opinion, consider the fact of this young man's violent background.

455 U.S. at 108-109.

This Court, in the opinion authored by Justice Powell, interpreted the trial judge's statement to mean that he had refused to consider, as a mitigating factor, the defendant's personal family history and other evidence presented on his character. The Court therefore held as follows:

In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Chief Justice Berger writing for the plurality, stated the rule that we apply today; '[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense

that the defendant proffers as a basis for a sentence less than death.'

455 U.S. at 110 (footnote omitted, emphasis original, citation omitted).

The Court remanded the case to the state court with the express direction that the court consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances.

Eddings, 455 U.S. at 118.

The Eddings opinion makes no mention whatsoever of the propriety of a mandatory death sentence where a prisoner serving a life sentence without the possibility of parole is convicted of murder, but rather, Eddings merely applies the general holding of Lockett v. Ohio, and earlier decisions. The Court in Lockett specifically left open the question which is presented petitioners saying:

We express no opinion as to whether the need to deter certain kinds of homicide would

justify a mandatory death sentence, as, for example, when a prisoner--or escapee--under a life sentence is found guilty of murder.

Lockett v. Ohio, 438 U.S. at 604-605, n. 11.

Eddings, which stands for the proposition that a sentencing court should consider all evidence of the personality and character of the accused which is offered in mitigation in a capital case where mitigating and aggravating factors must be weighed against each other, does not address the issue presented herein.

Although the appellate court notes that the absence of the specific language from the quotation is not conclusive, the court finds that the reservation of this language indicates an intent to withdraw this issue as one which has been left undecided by this Court. Eddings, 791 F.Supp. at 794. Additionally, the appellate court interpreted the emphasis on

individual consideration of the accused and the offense, and the lack of reference to this issue in decisions since Eddings, as an indication that this Court no longer considers this type of mandatory death sentence as one which may be constitutionally permissible. On the contrary, this Court's leading decisions concerning the death penalty, have simply not concerned the issues under discussion herein. See Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986); Ford v. Wainwright, ___ U.S. ___, 106 S.Ct. 2595 (1986); Cabana v. Bullock, ___ U.S. ___, 106 S.Ct. 689 (1986); Baldwin v. Alabama, ___ U.S. ___, 105 S.Ct. 2727 (1985); Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154 (1984); Pulley v. Harris, ___ U.S. ___, 104 S.Ct. 871 (1984); California v. Ramos, 463 U.S. 992 (1983); Zant v. Stephens, 462 U.S. 862 (1983); Barclay v. Florida, 403 U.S. 939 (1983); Enmund v. Florida, 458

U.S. 782 (1982).

III. NEVADA'S MANDATORY DEATH PENALTY IS A CONSTITUTIONAL AND NECESSARY DETERRENT TO THE CRIME OF MURDER COMMITTED BY A PRISONER ALREADY SERVING LIFE WITHOUT THE POSSIBILITY OF PAROLE.

The arguments against a mandatory death sentence are not persuasive when considering this particular case. Beginning with Furman, this Court has evolved standards that would serve both goals of measured, consistent application and fairness to the accused. In this case, Shuman had to be proven beyond a reasonable doubt to be guilty of murder with all evidence as to excuse, justification or mitigation found within such statute based upon evidence admitted at trial. This is not arbitrary nor is it based upon a whim of the jury or court. Nev. Rev. Stat. § 200.030(1)(b) was a very finitely drawn statute which literally required that Shuman must have been convicted of the unlawful killing of a human being, with

malice aforethought, and previously have been sentenced to life imprisonment without possibility of parole, for a prior violent offense. Shuman had been convicted of first degree murder in 1958. Under these circumstances, Shuman's sentence is not arbitrary or capricious. This Court has recognized that a death penalty which is not arbitrarily imposed, will undoubtedly deter others from the crime of murder. Gregg, 428 U.S. at 185-186.

The murder of staff and inmates within state correctional institutions is a significant problem in the United States today. In the years 1982, 1983 and the first six months of 1984, 213 inmates and 7 staff members were killed by inmates in state institutions. U.S. Department of Justice, "Sourcebook of Criminal Justice Statistics - 1985," Table 6.57, p. 555. These figures illustrate the general need for deterrence within our penal

institutions.

However, the need for deterrence is even greater in the case of prisoners serving life sentences without the possibility of parole in Nevada, as those prisoners have already demonstrated their propensity for violence and disregard for human life. In answer to this problem, the Nevada Legislature found that it could offer protection to those within a prison by use of a mandatory capital statute which is narrowly drawn. Under the circumstances of this case, the only appropriate punishment is the death penalty, and only the certain prospect of this penalty will deter this individual or others. See Commonwealth v. Ritter, 13 Pa. D. & C 285, 291 (1930).

CONCLUSION

The decision of the court of appeals, insofar as it affirmed the district court order vacating Shuman's death sentence

(see Pet. App. A, pp. 28a-29a), should be reversed.

Respectfully submitted.

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BRIEF

MOTION FILED
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(5)
No. 86-246

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE SUMNER, Director of Nevada Department of Prisons;
BRIAN MCKAY, Attorney General of Nevada,

Petitioners,

—versus—

RAYMOND WALLACE SHUMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE*
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AMERICAN CIVIL LIBERTIES UNION, AND THE ACLU OF
NEVADA FOUNDATION IN SUPPORT OF RESPONDENT**

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FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF
AMICI CURIAE OF THE CENTER FOR
CONSTITUTIONAL RIGHTS, THE
AMERICAN CIVIL LIBERTIES UNION,
AND THE ACLU OF NEVADA FOUNDATION
IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 36.3,
the Center for Constitutional Rights, the
American Civil Liberties Union and the
ACLU of Nevada Foundation respectfully
move for leave to file the attached Brief

Amici Curiae in support of Respondent Raymond Wallace Shuman in the above-captioned case.¹

In the attached brief, amici argue, in a concise manner, that the constitutional infirmities of mandatory death penalty statutes first articulated by this Court in Woodson v. North Carolina, 428 U.S. 280 (1976), apply equally to a statute that imposes the death penalty automatically upon a life-term inmate convicted of a subsequent murder. Amici devote their brief to demonstrating that no mandatory death penalty statute can adequately encompass the full range of mitigating factors relevant to the offense and the offender, and that Nevada's statute, in

¹Petitioners have refused to consent to the filing of this brief, making this motion necessary.

particular, treats vastly different offenders and offenses as an undifferentiated mass.

The CENTER FOR CONSTITUTIONAL RIGHTS ("CCR") is a non-profit legal and educational organization that was founded in 1966 to defend the civil rights movement against racist attacks. Since its beginning, the Center has opposed the death penalty in this Nation's courts and legislatures. Most recently, CCR attorneys litigated People v. Smith, 63 N.Y.2d 41 (1984), cert. denied, 469 U.S. 1227 (1985), in which the New York Court of Appeals struck down this country's last remaining mandatory death penalty statute.

The AMERICAN CIVIL LIBERTIES UNION ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the rights of criminal

defendants. The ACLU OF NEVADA FOUNDATION is one of its state affiliates. The ACLU opposes capital punishment and works in a variety of forums, including litigation, public education, and legislative advocacy on behalf of people facing death sentences.

For the foregoing reasons, amici pray that this motion for leave to file its brief will be granted so that they may bring their experience to bear upon the important questions presented by this case.

Respectfully submitted,

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INTEREST OF AMICI

The interest of amici is fully set forth in the attached Motion for Leave to File Brief Amici Curiae.

SUMMARY OF ARGUMENT

In Woodson v. North Carolina, 428 U.S. 280 (1976), this Court declared that North Carolina's mandatory death penalty violated the Eighth and Fourteenth Amendments to the Constitution of the United States because it failed to permit the jury to consider mitigating factors relevant to the individual offender and the offense. The statute also failed to comport with "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion), and it invited jurors to disregard their oaths by injecting consideration of the automatic penalty into the guilt/innocence phase of the trial.

In the years that followed Woodson, every mandatory death penalty statute in the Nation either has been declared unconstitutional by this Court, lower federal courts, or state courts, or has been repealed by state legislatures. Even Nevada repealed the statute at issue here, replacing it with a "guided discretion" statute in 1977.

This Court has reserved decision whether a mandatory statute might be constitutional if applied only to life-term inmates who are subsequently convicted of murder. See, e.g., Lockett v. Ohio, 438 U.S. 586, 604 n.11 (1978); Woodson, 428 U.S. at 207 n.7. But see Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). The principles of Woodson and its progeny, however, apply with equal force to mandatory statutes reserved for lifers who kill.

The Nevada statute at issue here suffers from the same constitutional infirmity as all mandatory statutes. Even though it applied only to inmates serving life without parole, the history and characteristics of a particular offender cannot be described solely in terms of the fact that he is serving a particular sentence. The statute fails entirely to permit the jury to consider the facts of the subsequent offense, automatically imposing death for any murder under any circumstance. Such a statute is incompatible with the care that our legal system demands must be taken to insure that the penalty fits the crime and the defendant.

Neither can a mandatory statute be justified on the basis that it is needed to deter prison murders by lifers. Because execution is never the inevitable result of a crime, it is only the threat

of capital punishment that deters, if capital punishment deters at all. Whether the death penalty is needed to deter lifers is a question logically connected to whether there should be a death penalty at all, not whether it should be mandatory or discretionary. In addition, all empirical evidence demonstrates that lifers tend to be relatively peaceful members of the prison community, and rarely recidivate while in prison.

That the United States has matured beyond the mandatory imposition of death is best demonstrated by the gradual change from mandatory to discretionary statutes that has characterized this country's jurisprudence for almost two centuries. Woodson, 428 U.S. at 290-95. This trend was briefly interrupted in the years 1972-1976, when ten state legislatures, including Nevada's,

erroneously assumed that this Court's opinion in Furman v. Georgia, 408 U.S. 238 (1972), required mandatory statutes as the only constitutional form of capital punishment. Following Woodson, these states again rejected mandatory statutes, and reenacted "guided discretion" laws or chose abolition. In 1977, Nevada repealed all of its post-Furman mandatory statutes.

Nevada's former mandatory death penalty permitted the jury unbridled discretion to impose death or to grant mercy by disregarding their oaths and basing a finding of guilt or innocence upon the penalty to be imposed. As the Woodson Court held, the mandatory death penalty does not reduce, but instead encourages, unfettered discretion. 428 U.S. at 303.

Raymond Wallace Shuman should not be killed under the dictates of a law that

every jurisdiction in this country has rejected, including the state in which he has been sentenced to die.

ARGUMENT

I. NEVADA'S MANDATORY DEATH PENALTY DOES NOT PERMIT INDIVIDUALIZED CONSIDERATION OF MITIGATING FACTORS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Respondent, who was serving a life sentence without parole, was sentenced under the now-repealed Nevada Revised Statute § 200.030 (1973), which provided that "[e]very person convicted of capital murder shall be punished by death." Sentencing under § 200.030 was a cruel formality--there was no opportunity to consider relevant factors in the defendant's record or in the circumstances of the crime that might indicate why the death penalty should not be imposed. Indeed, no sentence other than death was possible. This mandatory imposition of death cannot withstand constitutional scrutiny.

A. This Court Has Consistently Required Individualized Decisions in Capital Cases.

This Court has never passed on the constitutionality of the mandatory death penalty as it may be applied to "lifers" who kill. For over a decade, however, this Court has consistently declared mandatory statutes unconstitutional, ruling that "an individualized decision is essential in capital cases." Lockett v. Ohio, 438 U.S. at 605 (plurality opinion).¹ Because death is different from all other punishments, "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more

¹Chief Justice Burger wrote the plurality opinion, joined by Justices Powell and Stevens. Justice Marshall concurred in the judgment on the basis that the death penalty is cruel and unusual punishment per se. 438 U.S. at 619. Justice Brennan did not take part in the case, but there is no doubt that he would have adhered to his long-standing view that the death penalty is unconstitutional.

important than in noncapital cases." Id. Mandatory statutes are incompatible with the scrupulous care required by our justice system when human life is at stake. The reasoning that has led the Court to strike down each mandatory death penalty it has confronted since 1976 applies with no less force in this case.

In Woodson, this Court struck down North Carolina's mandatory death penalty and held that the Eighth and Fourteenth Amendments require a sentencing scheme that permits consideration of all relevant mitigating factors before the death penalty can be imposed. The Woodson plurality² held:

²Justice Stewart wrote the plurality opinion which was joined by Justices Powell and Stevens. Woodson, 428 U.S. at 283. Justices Brennan and Marshall concurred, finding the death penalty to constitute cruel and unusual punishment per se. Id. at 305-06. See Gregg v. (Footnote Continued)

[T]he North Carolina statute fail[s] to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. . . . [D]eath is a punishment different from all other sanctions in kind rather than degree. . . . A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson, 428 U.S. at 303-04 (emphasis added).

By requiring the consideration of

(Footnote Continued)
Georgia, 428 U.S. 153, 227-31 (1976)
(Brennan, J., dissenting); id. at 231-41
(Marshall, J., dissenting).

"compassionate" and "mitigating" factors, this Court recognized that in non-capital cases individualized sentencing determinations merely reflect "enlightened policy." In capital cases, however, the plurality held that the Constitution mandates such consideration:

[T]he fundamental respect for humanity underlying the Eighth Amendment. . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 304-05 (emphasis added).

Similarly, in Roberts (Stanislaus) v.

Louisiana, 428 U.S. 325 (1976)

(hereinafter "Roberts I"), and Roberts

(Harry) v. Louisiana, 431 U.S. 633 (1977) (per curiam) (hereinafter, "Roberts II"), this Court³ reiterated its position that the Constitution requires the sentencer to consider mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender before the sentence of death can be imposed. See Roberts I, 428 U.S. at 333-34; Roberts II, 431 U.S. at 637; see also Jurek v. Texas, 428 U.S. 262, 271 (1976) (plurality opinion) ("[A] capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.").

³In Roberts I, Justice Stevens wrote the plurality opinion, joined by Justices Powell and Stewart. 428 U.S. at 327. Justices Brennan and Marshall concurred in the judgment, finding the death penalty to constitute cruel and unusual punishment per se. Id. at 336-37. In

(Footnote Continued)

Consideration of mitigating factors is such a vital procedural prerequisite to the imposition of the death penalty that this Court has never permitted it to be circumscribed, in any way, by courts or legislatures.⁴ In Lockett, this Court struck down an Ohio sentencing scheme that limited consideration of mitigating factors to three statutorily defined areas. The plurality held that:

(Footnote Continued)
Roberts II, Justices Stewart, Stevens, Brennan, Marshall and Powell joined in the per curiam opinion.

⁴The recent decision in California v. Brown, 55 U.S.L.W. 4155 (Jan. 27, 1987), is not to the contrary. There, a four-Justice plurality held that an instruction that told the jury not to be swayed by "mere sympathy" did not prevent the jury from weighing all relevant mitigating circumstances. The five remaining Justices emphasized the need "to consider all of the mitigating evidence introduced by the respondent." Id. at 4157 (O'Connor, J., concurring) (emphasis added); see id. at 4158 (Brennan, J., dissenting, joined by Marshall, Stevens, J.J.); id. at 4162

(Footnote Continued)

There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

438 U.S. at 605 (emphasis added); see also Green v. Georgia, 442 U.S. 95 (1979)

(An otherwise valid state hearsay rule, when applied during a capital sentencing hearing to exclude mitigating information, violated defendant's constitutional rights).

Similarly, in Eddings v. Oklahoma, 455 U.S. 104 (1982), the death sentence was held unconstitutional although the

(Footnote Continued)
(Blackmun, J., dissenting, joined by Marshall, J.).

statute permitted the sentencer to consider any mitigating evidence, because the sentencing judge appeared to think that he could not consider in mitigation the defendant's troubled and violent childhood. The Eddings Court held, without qualification:

'[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer. . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'

Id. at 110 (emphasis and ellipses in original) (quoting Lockett, 438 U.S. at 604).⁵

⁵In Eddings, this Court, while quoting Lockett, omitted the reservations about mandatory statutes for lifers that had been expressly stated in earlier cases. Compare Eddings, 455 U.S. at 110 with Lockett, 438 U.S. at 604 n.11; Roberts II, 431 U.S. at 637 n.5; Roberts (Footnote Continued)

Woodson and its progeny reaffirm the requirement that all mitigating factors must be considered before the death penalty can be imposed. This procedure is a constitutionally indispensable safeguard that insures that society's ultimate sanction will be imposed only after all relevant information about the defendant has been brought to light and evaluated. Section 200.030, which does not permit consideration of any mitigating factors, flagrantly violates this requirement.

- B. Other State Courts Have Rejected Statutes Similar to Section 200.030, Because They Eliminate Consideration of Mitigating Factors Relevant to the Offender and the Offense.

(Footnote Continued)

I, 428 U.S. at 334 n.9; Woodson, 428 U.S. at 207 n.7; Gregg, 428 U.S. at 186. See also Skipper v. South Carolina, 106 S.Ct. 1669, 1670-71 (1986) (quoting Lockett, 438 U.S. at 604, but omitting reservation); California v. Ramos, 463 U.S. 992, 1001 (1983)(same).

Although this Court has never passed on the question, three state courts that have considered the issue have recognized that the mandatory death penalty is unconstitutional in all cases. The New York Court of Appeals, in People v. Smith, 63 N.Y.2d 41 (1984), cert. denied, 469 U.S. 1227 (1985), declared New York's mandatory death penalty unconstitutional, relying exclusively on federal constitutional grounds. New York's Penal Law §§ 60.06 and 125.27 provided for the mandatory imposition of death in all cases in which an inmate, serving a term of fifteen years to life, was subsequently convicted of the intentional murder of a corrections official. The Court of Appeals held:

Individualized consideration of the offender and the offense is simply a recognition that in every case there are invariably differences. In capital cases, where such consideration is constitutionally required, the purpose is to reduce the risk

that the death penalty will be imposed in spite of factors about the person or the crime which call for a different penalty.

* * *

A mandatory death penalty statute simply cannot be reconciled with the scrupulous care that the legal system demands to insure that the death penalty fits the individual and the crime.

Id. at 74-75, 78; accord Shuman v. Wolff, 791 F.2d 788, 796 (9th Cir. 1986), cert. granted, __ U.S. __, 107 S. Ct. 431 (1986).

The Rhode Island Supreme Court, following the reasonable interpretation of this Court's post-Furman cases, held that the Eighth and Fourteenth Amendments require consideration of particularized mitigating factors in every case. State v. Cline, 397 A.2d 1309 (R.I. 1979). Consequently, it found unconstitutional the Rhode Island death penalty statute,

which mandated death for any prison inmate who killed.⁶ The California Court of Appeals reached the same result in Graham v. Superior Court, 98 Cal. App. 3d 880, 160 Cal. Rptr. 10 (1980), and struck down California's mandatory death penalty for inmates who kill.⁷ But see Thigpen

⁶Although Cline technically did not pass on the question of mandatory death for "lifers," the opinion, which held that "a death sentence imposed by a sentencer who is not statutorily authorized to consider mitigating factors is a nullity," 397 A.2d at 1311, admits no other construction.

⁷Every other state to have mandatory death penalties adopted "guided discretion" statutes following Woodson and the Roberts cases. See Note, The Constitutionality of the Mandatory Death Penalty for Life-Term Prisoners Who Murder, 55 N.Y.U.L. Rev. 636, 639 n.19 (1980) (hereinafter, "Mandatory Death Penalty"). New York has not reinstituted any death penalty.

Legal scholars uniformly agree that no mandatory death penalty statute is constitutional under this Court's standards. See, e.g., Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital

(Footnote Continued)

v. Smith, 603 F. Supp. 1517 (S.D. Ala. 1985) (Alabama's former mandatory death penalty, automatically imposing the death sentence upon a life-term inmate who is subsequently convicted of first-degree murder, is constitutional as applied to this defendant), vacated on other grounds and remanded, 792 F.2d 1516 (11th Cir. 1986).

The Nevada Supreme Court, in Shuman v. State, 94 Nev. 265 (1978), did not have the benefit of the New York, Rhode Island, or California precedents when it affirmed petitioner's sentence of death.

(Footnote Continued)
Defendant's Right to Consideration of Mitigating Circumstances, 69 Cal. L. Rev. 317, 323 (1981); Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1 (1980); Note, Mandatory Death Penalty, *supra*; see also Stanley v. Zant, 697 F.2d 955, 959 (11th Cir. 1983) ("Lockett, when combined with cases such as Gregg . . . means that the sentence of death may only be proper under a system allowing guided individualization."), cert. denied, 467 U.S. 1219 (1984).

The Shuman Court reasoned that life-term inmates, subsequently convicted of intentional murder, could not possibly adduce sufficient mitigating factors to justify any sentence other than death. Id. at 271. Supporters of the mandatory death penalty frequently repeat this argument. They claim that a "narrow" statute that defines death penalty eligibility substantially in terms of a defendant's past history and characteristics provides the special demand for reliability in death penalty sentencing.

Petitioners further argue that Nevada's statute, unlike New York's, is applicable only to inmates serving terms of life without parole, thus purportedly "narrowing" the statute's scope. Hence, the state asserts, mandatory death is appropriate for lifers who kill because these individuals have already

demonstrated their violent propensities. No reference to mitigating circumstances is necessary, the argument goes, because of the presupposition that lifers who kill are already the very worst of the very bad.

As the court below noted, § 200.030 does not permit the jury to consider a wide range of characteristics that vary from offender to offender. The character and history of a defendant cannot be defined solely in terms of a life sentence:

At the time Shuman was convicted of the second murder in 1973, a person could have been serving a life sentence without the possibility of parole for numerous offenses. At the time of his 1958 conviction, the applicable Nevada statute authorized a sentence of life imprisonment without the possibility of parole for the following offenses:

All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be

committed in the perpetration, or attempt to perpetuate, any arson, rape, robbery or burglary, or which shall be committed by a convict in the state prison serving a sentence of life imprisonment

Nev. Rev. Stat. § 200.030(1) (1957). Thus, a sentence of life imprisonment without the possibility of parole could have resulted from conduct such as a killing by an accomplice in an attempted burglary or it could have resulted from conduct as aggravated as a torture murder.

791 F.2d at 795.

Not only does § 200.030 fail to distinguish between vastly different offenders, it also fails to distinguish between very different offenses.

Although § 200.030 defined the range of offenders more narrowly than its New York counterpart (applying only to inmates serving terms of life without parole), the statute was applicable to far more types of murders than the New York statute. Under the Nevada law, a

life-term inmate who commits any murder, under any circumstances, suffers the mandatory imposition of the death penalty. New York, by contrast, "narrowed" the range of offenses by prescribing mandatory death only where the victim was a corrections employee, performing his official duties, and the defendant knew or should have known of this status.⁸

Hence, § 200.030 fails to distinguish between a lifer who kills another inmate in a prison fight and one who masterminds an escape in which a guard is taken hostage and murdered. In both cases, the death penalty would be

⁸This is not to suggest that amici would consider even the narrowest mandatory statute to be constitutional. Rather, amici point out that Nevada's statute is, in many respects, far broader than other laws that failed to pass muster under Woodson.

automatically imposed, as § 200.030 presupposes that lifers who kill are an "undifferentiated mass" deserving of the same penalty.

It is this mechanical treatment of the offender and the offense that this Court condemned in Roberts I and Roberts II. In the first Roberts case, this Court held:

The constitutional vice of mandatory death sentence statutes -- lack of focus on the circumstances of the particular offense and the character and propensities of the offender -- is not resolved by Louisiana's limitation of first-degree murder to various categories of killings. The diversity of circumstances presented in cases falling within the single category of killings during the commission of a specified felony, as well as the variety of possible offenders involved in such crimes, underscores the rigidity of Louisiana's enactment and its similarity to the North Carolina statute.

428 U.S. at 333 (emphasis added). This Court went even further in Roberts II,

when it struck down Louisiana's narrower statute, which provided for mandatory death upon conviction of the murder of a police officer. The identity of the victim could properly be considered as an aggravating factor:

But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

431 U.S. at 636-37 (emphasis added); see also Graham v. Superior Court, 98 Cal. App. 3d at 886, 160 Cal. Rptr. 13 ("The People contend that former Section 4500 is so narrowly drawn that its definition manifests an adequate

consideration of aggravating and mitigating factors: it applies the mandatory death penalty only to a malicious killing and only to a life prisoner. These qualifications, however, encompass a wide range of personal culpability. . . .) (emphasis added); cf. Jurek, 428 U.S. at 271 ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.")

C. The Need to Deter Prison Murders By "Lifers" Cannot Justify a Mandatory Death Penalty.

One argument put forth in support of a mandatory death penalty for life-term inmates convicted of murder assumes that an inmate, once sentenced to "life" imprisonment, otherwise has nothing to lose by taking the life of a fellow inmate or prison staff. He only faces another "life" sentence. Therefore, the

argument goes, only a penalty as drastic and severe as the mandatory death penalty will pose a sufficient threat to life-term inmates that it will deter them from committing murder while in prison.

Cf. Shuman v. State, 94 Nev. at 271.

This argument is unsupported by any empirical evidence or logic.

There is a wealth of conflicting, and often confusing, data on whether or not the death penalty itself is an effective deterrent. However, there is very little information on whether mandatory statutes deter prison homicides better than discretionary ones. The data that exist demonstrate that murders by life term inmates are infrequent generally, but occur at approximately the same rate in states with mandatory death penalties, discretionary death penalties, and no death penalty at all. Wolfson, The Deterrent Effect of the Death Penalty

Upon Prison Murder, in The Death Penalty in America § 4, at 159-73 (H. Bedau ed. 1982); T. Sellin, The Penalty of Death 104-13 (1980).⁹

The court below noted:

The argument that the death penalty is a necessary deterrent to a person serving a term of life imprisonment without a possibility of parole because another such sentence would constitute no deterrent, is more logically concerned with the question of whether there should be a death penalty at all, rather than whether the penalty should be mandatory.¹⁰

⁹See also F. Evrard, Successful Parole 100 (1971); Giardini & Farrow, The Paroling of Capital Offenders, in Capital Punishment 169 (T. Sellin ed. 1967); Heilbrun, Heilbrun & Heilbrun, Impulsive and Premeditated Homicide: An Analysis of Subsequent Parole Risk of the Murderer, 69 Crim. L. & Criminology 108 (1978); Stanton, Murderers on Parole, 15 Crime and Delinq. 149 (1969).

¹⁰In fact, the death penalty is particularly unsuited to deterring prison homicides. As the Court noted in Gregg v. Georgia, 428 U.S. at 186, the death penalty is apt to deter the "carefully contemplated murders, such as murder for hire, where the possible penalty of death

(Footnote Continued)

791 F.2d at 795.

Even when the death penalty is mandatory, "[e]xecution is never an inevitable consequence of a criminal act." People v. Smith, 63 N.Y.2d at 77. As the Smith court stated, there are numerous points in the course of a criminal investigation and prosecution when the imposition of the death penalty may be precluded. The grand jury may choose to indict for a non-capital offense, or the defendant may plead guilty to a lesser charge. The jury may acquit, or the appellate court may

(Footnote Continued)
may well enter the cold calculus that precedes the decision to act." Prison inmates, however, do not appear to carefully calculate the judicial consequences of their actions. Most prison homicides usually result from riots or spontaneous flare-ups between inmates, rather than from premeditation and planning. H. Toch, Police, Prisons and the Problem of Violence 52-53 (1977); Buffum, Prison Killings and Death Penalty Legislation, 53 Prison J. 411 (1974).

reverse the conviction. Of course, the killer rarely expects to be apprehended. Hence, "it is only the specter of execution which can serve as a general deterrent." Id. at 77:

Because execution is not inevitable, a discretionary death penalty, which allows for the consideration of the character as well as the record of the individual offender and the circumstances of the particular offense, differs little in terms of deterrence from a mandatory death penalty and does not in fact detract from the value of capital punishment as a deterrent.

Id.

The argument that a mandatory death penalty is needed to deter killings by lifers not only misconceives what is and what is not an effective deterrent, but also exaggerates the need for such a deterrent. Although surprisingly little information has been compiled on the level and nature of prison violence, the data that are available establish that life-term inmates do not pose a serious threat to the safety of others while in

prison. Life prisoners are responsible for an extremely small percentage of the prison homicides that occur.

The most recent study, based on 1973 data, shows that prison homicides occur infrequently and are seldom committed by life-sentenced inmates. The 1973 data came from 148 states and 24 federal prisons for male felons. No homicides occurred in 117 of these institutions and in three others, one excusable and three justifiable homicides were committed by prison guards. Fifty-two institutions shared a total of 124 homicides, i.e., first and second degree murder and non-negligent manslaughter. Only 11 of the offenders were serving life sentences for murder. See T. Sellin, W. Wolfson, The Patterns of Prison Homicide, Unpublished Dissertation, Univ. of Pa. (1978). The recidivism rate is extremely low for those inmates previously convicted of

murder. Only one-fifth of one percent of all convicted murderers recidivate in prison. And the recidivism rate is actually lower in jurisdictions which have abolished the death penalty.

Wolfson, The Deterrent Effect of the Death Penalty Upon Prison Murder, supra, at 168.

II. NEVADA'S MANDATORY DEATH PENALTY STATUTE DOES NOT COMPORT WITH CONTEMPORARY STANDARDS OF DECENCY.

The substantive component of the cruel and unusual punishment clause prohibits the infliction of punishments that transgress "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. at 99. To determine whether a punishment comports with such standards, this Court has looked to history and traditional usage, see Furman, 408 U.S. at 291 (Brennan, J., concurring); Trop,

356 U.S. at 99; legislative enactments, see Gregg v. Georgia, 428 U.S. 153, 179-81 (1976) (plurality opinion); Weems v. United States, 217 U.S. 349, 377 (1910) (noting that the punishment of cadena temporal at issue in that case had "no fellow in American legislation"); and jury determinations, see McGautha v. California, 402 U.S. 183 (1971); Witherspoon v. Illinois, 391 U.S. 510, 519-20 & n.15 (1968). Examination of all these factors admits no other conclusion than that this country has long ago rejected a mandatory death penalty for prisoners serving life sentences.

A. The Nation's Pre-Furman
Rejection of The Mandatory
Death Penalty

In Woodson, the Court traced the history of the mandatory death penalty, noting that at the time the Eighth Amendment was adopted in 1791 the nation retained its common-law heritage and

prescribed death as the only penalty for a broad range of offenses. See, e.g., H. Bedau, The Death Penalty in America 5-6, 15, 27-121 (1967); R. Bye, Capital Punishment in the United States 1-3 (1919). Dissatisfaction with this remnant of a redoubtable colonial legacy soon prompted state legislatures to limit the type of offenses for which the penalty would be imposed. See H. Bedau, supra, at 23-24; R. Bye, supra, at 5; Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. Pa. L. Rev. 1099, 1102 (1953). This reform prompted yet further "narrowing" until, by the early 19th century, the mandatory death penalty was authorized only for certain types of homicide. See Woodson, 428 U.S. at 290-92.

Even these reforms, however, resulted in frequent jury nullification. Many plainly guilty offenders were

acquitted because the jury did not wish to impose the penalty of death. See H. Bedau, supra, at 27. Tennessee became the first state to address this problem by adopting a statute that permitted jury discretion as to sentence. Tenn. Laws 1837-1838, c. 29. By 1900, 25 states and the federal government had abandoned the mandatory death penalty in favor of discretionary statutes. Woodson, 428 U.S. at 291. Fourteen more states followed suit in the next two decades. By 1963, no jurisdiction in the country retained a mandatory death penalty generally for the crime of murder. Id. at 291-92. With the lone exception of Vermont, no state, prior to Furman, ever returned to a mandatory death penalty after adopting a discretionary statute. Id. at 295 n.30.

This widespread rejection was not

limited to general mandatory death penalty statutes. Even mandatory death sentences for murders by life-term prisoners had become relics. By 1964, only five states (Nevada not among them) had such statutes, and by 1970 prisoners awaiting execution pursuant to such a statute represented less than 1% of the nation's Death Row population. Id. at 292 n.25.

This Court has repeatedly recognized that standards of decency have relegated the mandatory death penalty to a dark corner of history. In Winston v. United States, 172 U.S. 303, 310 (1899), the Court noted:

The hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment, instead of by death.

In Williams v. New York, 337 U.S. 241, 247 (1949), the Court commented on our nation's rejection of mandatory sentences:

The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions. . . .

And in McGautha, 402 U.S. at 198-202, the Court discussed the American "rebellion against the common-law imposing a death sentence on all convicted murderers." Id. at 198. Finally, in Woodson, the Supreme Court relied on this progressive historical tradition to strike down North Carolina's mandatory death penalty:

North Carolina's mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments' requirement that the State's power to punish 'be

exercised within the limits of civilized standards.'

428 U.S. at 301 (quoting Trop, 356 U.S. at 100).

B. The Confusion Over Furman and the Brief Return of Mandatory Statutes

Nevada had completely abandoned mandatory death penalty statutes by the early part of the century. Rev. Laws of Nev. § 6386, subsec. 121 (1912) (Discretionary death penalty for all first-degree murders; term of imprisonment for all second degree murders). This discretionary death penalty remained the law of Nevada until 1973, when it was replaced with a mandatory statute providing that the penalty of death would be imposed for various types of murders and upon various types of offenders. (Nevada Rev. Stat. § 200.030 (1973)). This reversion to a long-discarded mandatory statute was

prompted by an attempt to comply with the mandate of Furman v. Georgia.

In Furman, this Court reversed several death sentences, but the majority failed to agree on a rationale. Each member of the Court produced a separate opinion. "Predictably, the variety of opinions supporting the judgment in Furman engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." Lockett, 438 U.S. at 599. It was widely, if erroneously, believed that Furman required the elimination of any discretion in the imposition of capital punishment.¹¹

¹¹See, e.g., Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1712 (1974) (concluding that "mandatory statutes seem to fulfill Furman's requirement that discretion in the sentencing process be cabined.")

After Furman, ten states, including Nevada, enacted mandatory statutes. This was an unprecedented reversal of a previously inexorable historical trend away from such laws. See Woodson, 428 U.S. at 295 n.30. However, as this Court has observed, the new statutes did not "evinced a sudden reversal of societal values regarding the imposition of capital punishment." Instead, they "reflect[ed] attempts by the States to retain the death penalty in a form consistent with the Constitution. . . ." Id. at 298.

This was clearly the case in Nevada. Furman prompted an immediate revision in a death penalty law that had been in effect for over sixty years. Nevada's legislature apparently assumed that Furman left it no capital punishment alternative. Woodson and its progeny quickly proved that assumption erroneous.

Accordingly, the Nevada legislature abandoned all mandatory statutes in 1977, and adopted the present "guided discretion" law. All of the other states to adopt mandatory statutes after Furman have either replaced them with discretionary statutes or with abolition. Note, Mandatory Death Penalty, supra, note 7 at 639 n.19. The entire nation has reaffirmed its original rejection of mandatory death sentences. In the entire country, only two men -- Raymond Wallace Shuman and Donald Thigpen -- face execution under these now-repealed mandatory statutes.

Faced with evidence far less compelling, this Court has concluded that history and society had turned their backs on a particular sanction, relegating it to the barbarians. See, e.g., Enmund v. Florida, 458 U.S. 782 (1982) (imposition of the death penalty

for non-triggermen convicted of felony murder is cruel and unusual, although at least nine states authorize it); Coker v. Georgia, 433 U.S. 584, 593-96 (1977) (death penalty for rape violates the Eighth Amendment although three states had reinstated it after Furman). In Woodson, the Supreme Court ruled that general mandatory death statutes were beyond the bounds of civilized society although ten states had just enacted them. Now ~~that~~ every state, including Nevada, has abandoned such a sanction for the crime involved here, no other conclusion is conceivable.

III. SECTION 200.030 INVITES JURORS TO DISREGARD THEIR OATHS, LEAVING THE IMPOSITION OF THE DEATH PENALTY TO THE UNGUIDED DISCRETION OF JURORS.

A third constitutional flaw in Nevada's death penalty statute is that a mandatory death sentence, following

conviction, invites jurors to disregard their oaths and return a verdict of guilt or innocence based upon the penalty that they believe should be imposed. By providing no standards for the jury to decide who lives and who dies, mandatory statutes grant total and unreviewable discretion to the venire. It is this grant of "unbridled, standardless discretion" that the Court condemned in Furman, Woodson, Roberts I, and Roberts II.

In Furman, a plurality of the Court found that vesting standardless sentencing power in the jury constituted cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments. See Furman, 408 U.S. at 309-10 (Stewart, J., concurring); id. at 313 (White, J., concurring); cf. id. at 253-57 (Douglas J., concurring); see also, id. at 398-99 (Burger, C.J.,

dissenting).¹² In response to this decision, the states that retained the death penalty amended their sentencing schemes in one of two ways. The majority enacted so-called "guided discretion" statutes, permitting juries to consider both aggravating and mitigating factors before imposing the death penalty. A minority of ten states, including Nevada, responded to Furman by enacting mandatory death penalties, under the erroneous but understandable belief that such statutes comported with Furman. See, e.g., Note, Mandatory Death Penalty, supra note 7 at 639 n.19.

In Woodson, this Court stated that a mandatory death sentence statute did not

¹²Justices Brennan and Marshall adhered to their view that the death penalty constituted cruel and unusual punishment per se. See Furman, 408 U.S. at 305-06 (Brennan, J., concurring); 408 U.S. at 370-71 (Marshall, J., concurring).

solve the problem of vesting the jury with unbridled and unreviewable sentencing discretion, but merely "papered over" it. 428 U.S. at 302. Accord Roberts I, 428 U.S. at 334-35. The Woodson Court noted that there was general agreement that American juries have persistently refused to convict a significant number of first-degree murderers because they did not believe that the particular offender deserved to die. 428 U.S. at 302. Historically, the death penalty was imposed in less than 20% of the cases in which it was authorized. Id. at 295 n.31.

Based on this record, the Woodson Court concluded that "it is only reasonable to assume that many juries under mandatory statutes will consider the grave consequences of a conviction in reaching a verdict." Id. at 303. Hence:

North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences. Instead of rationalizing the sentencing process, a mandatory scheme may well exacerbate the problem identified in Furman by resting the penalty determination on the particular jury's willingness to act lawlessly. While a mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.

Id. (emphasis added) (footnote omitted). The mandatory Louisiana statute struck down in Roberts I suffered from the identical defect.

This Court expanded upon the unconstitutional risk posed by jury nullification in Beck v. Alabama, 447 U.S. 623 (1980), commenting:

For, as historical evidence indicated, juries faced with a mandatory death penalty statute often created their own sentencing discretion by distorting the fact-finding process, acquitting even a clearly guilty defendant if they felt he did not deserve to die for his crime.

Id. at 639-40 (footnote omitted).

It is not only the tendency to acquit the guilty that makes the statute unconstitutional. It is also the converse -- defendants are sentenced to death based on the arbitrary, standardless, and unreviewable decision of the jury that this particular defendant should die.¹³

¹³See Note, Mandatory Death Penalty, supra, note 7 at 655-56 (footnotes omitted).

A jury's decision either to convict because it wants the defendant to receive some punishment, or to acquit because it does not believe that this defendant 'deserves' to die, reflects an intuitive understanding of the need for individualized consideration of

(Footnote Continued)

This freakish imposition of the death penalty is even more likely to occur under § 200.030 than under the statutes declared unconstitutional in Woodson or the Roberts cases. Under § 200.030, the jury already knows that the defendant is serving a long term of imprisonment. They do not face the choice of either letting the defendant loose on the street or sentencing him to die. It is therefore easy for the jury to disregard its oath and to mete out death or mercy in accordance with its unbridled discretion. This

(Footnote Continued)

offender and offense. . . . But individualized sentencing cannot proceed without standards. Juries should not be permitted to provide standards for themselves; this is the lesson of all the death penalty cases, beginning with Furman and culminating in Beck Juries must be guided; the guarantee of reliable and reasonable sentencing must come from outside the jury room.

standardless, wholly discretionary imposition of death violates the Eighth and Fourteenth Amendments and is irreconcilable with every death penalty case decided by this Court in the past decade.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GEORGE SUMNER, *et al.*,

Petitioners,

v.

RAYMOND WALLACE SHUMAN,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

MOTION OF *AMICI CURIAE* JOHNNY HARRIS
AND DONALD THIGPEN FOR LEAVE TO FILE
BRIEF IN SUPPORT OF RESPONDENT

AND

BRIEF OF *AMICI CURIAE*
JOHNNY HARRIS AND DONALD THIGPEN
IN SUPPORT OF POSITION OF RESPONDENT

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BRIEF IN SUPPORT OF RESPONDENT**

Pursuant to Rule 36.3 of the Rules of this Court, *amici curiae* Johnny Harris and Donald Thigpen respectfully move for leave to file a brief in support of the position of respondent Raymond Shuman. Respondent has consented to the filing of the brief; petitioners have not.

Apart from Raymond Shuman, Johnny Harris and Donald Thigpen are the only persons in the United States under sentence of death pursuant to a statute that required automatic imposition of the death pen-

alty upon any person convicted of murder while serving a life term. Mr. Harris and Mr. Thigpen were both sentenced to death under former Title 14, Section 319 of the Alabama Code of 1940, which—similarly to the Nevada statute at issue in this case—required that a death sentence be imposed upon any person convicted of first degree murder while serving a life sentence.

The Court's decision in this case is likely to have a direct impact on the fates of Mr. Harris and Mr. Thigpen. It may control the result that will be reached in these *amici's* direct challenges to the former Alabama statute.* This Court's decision may well dictate whether Mr. Harris and Mr. Thigpen live or die. In fairness, they should be accorded the opportunity to be heard before this Court's decision is rendered.

Furthermore, Mr. Harris and Mr. Thigpen are in a unique position to aid the Court's consideration of the issue raised. The facts leading to Mr. Harris's and Mr. Thigpen's death sentences differ substantially. Those facts are also quite different from the circumstances leading to respondent's conviction and death sentence. *Amici* are uniquely positioned to bring to the Court's attention the wide variety of factual circumstances to which these mandatory statutes have been and could be applied.

The interests of Mr. Harris and Mr. Thigpen, and the assistance they can provide to this Court, are direct and substantial. The participation of these individuals as *amici curiae* will facilitate the Court's

* Mr. Harris' conviction and sentence are now on direct appeal before the Alabama state courts and Mr. Thigpen currently has a *habeas corpus* petition pending in federal district court.

thorough consideration of the issue presented in this case. Accordingly, Mr. Harris and Mr. Thigpen respectfully request that their motion for leave to file an *amici curiae* brief in support of respondent be granted.

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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1986

No. 86-246

GEORGE SUMNER, *et al.*,
Petitioners,
 v.
 RAYMOND WALLACE SHUMAN,
Respondent.

On Writ of Certiorari to the
 United States Court of Appeals
 for the Ninth Circuit

BRIEF OF AMICI CURIAE
 JOHNNY HARRIS AND DONALD THIGPEN
 IN SUPPORT OF POSITION OF RESPONDENT

INTERESTS OF AMICI CURIAE

The interests of *amici curiae* Johnny Harris and Donald Thigpen—Alabama death-row inmates who are the only two persons in the United States other than respondent currently sentenced to die under a statute mandating the death penalty, without regard to any mitigating circumstances, for any person convicted of murder while serving a life term—are set out fully in the Motion for Leave to File, *supra*.

SUMMARY OF ARGUMENT

The Eighth and Fourteenth Amendments require that the ultimate penalty be imposed only pursuant to procedures that reliably ensure that death is the appropriate punishment in the specific case. A sentencer's consideration of the particular circumstances of the offense and the character and record of the defendant is therefore a necessary prerequisite in capital sentencing. Statutes that mandated death for one convicted of committing murder while serving a life term, without regard to any potentially mitigating factors, cannot be reconciled with the Eighth Amendment requirement of reliability.

The facts in the cases of Mr. Harris and Mr. Thigpen—the only persons other than the respondent presently on death row pursuant to a mandatory statute—exemplify the widely divergent circumstances to which such statutes have been and could be applied. They reveal many mitigating factors that could be present, but—because of the mandatory statute—were ignored. By not allowing consideration of the various circumstances of the particular cases, the mandatory statutes failed—in violation of the requirements of the Eighth and Fourteenth Amendments—to distinguish adequately and rationally between those for whom death is an appropriate punishment and those for whom it is not.

Nor is there any valid basis for concluding that these statutes addressed a situation that could or should be excepted from constitutional requirements. Constitutional principles may not be subjugated to a state's desire to utilize a particular procedure, especially where, as here, any legitimate interest concerning murders by life-term inmates can be satisfied fully by use of a discretionary, individualized procedure.

Finally, there is overwhelming evidence that these now-repealed mandatory statutes are proscribed by the “evolv-

ing standards of decency” incorporated into the Eighth and Fourteenth Amendments.

ARGUMENT

This Court repeatedly has emphasized that death is qualitatively different from other punishments, and that there is, accordingly, an enhanced need for reliability in capital sentencing determinations.¹ In particular, the Court has given heightened scrutiny to the *procedure* by which states have attempted to impose the death penalty. *California v. Ramos*, 463 U.S. at 999.

The procedure for imposing the death penalty prescribed by the statutes that mandated the death penalty for all life-term inmates who were convicted of murder (“mandatory statutes”)² must be unconstitutional unless consistent with the particularized consideration requirement

¹ See, e.g., *California v. Ramos*, 463 U.S. 992, 998-99 (1983) (the “qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination”); *Eddings v. Oklahoma*, 455 U.S. 104, 117-118 (1982) (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (Opinion of Burger, C.J. and Stewart, Powell, & Stevens, JJ.); see also *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (Opinion of Stewart, Powell & Stevens, JJ.) (Due Process Clause circumscribes available procedures for imposing death penalty); *id.* at 362 (Burger, C.J., concurring in judgment); *id.* at 362-64 (White, J., concurring in judgment) (Eighth Amendment circumscribes procedures for imposing death sentences); *id.* at 364 (Blackmun, J., concurring in judgment); *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); and *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Opinion of Stewart, Powell & Stevens, JJ.) (invalidating mandatory death penalty statutes).

² The only two statutes implicated here are Nev. Rev. Stat. § 200.030(I)(b) (1973) (the “Nevada statute”), under which respondent was convicted and sentenced to die, and Section 319 of Title 14 of Alabama's Code of 1940 (the “Alabama statute” or “Section 319”), under which amici were condemned. Those statutes, like all others of their kind, have now been repealed; they however continue to control the fates of respondent and amici.

enunciated in *Woodson v. North Carolina* and its progeny, or unless there is some basis for excepting such statutes from the rationale of those cases.³ Neither can be said of these mandatory statutes.

I. The Mandatory Statutes Are Inconsistent With The Eighth Amendment Requirement of Individualized Consideration.

In *Woodson v. North Carolina*, 428 U.S. 280 (1976), this Court ruled that statutes mandating the death penalty for all murders violate the Eighth and Fourteenth Amendments. A plurality of the Court described the procedural flaw in such statutes as follows:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors

³ Petitioners rely heavily on the presumption of validity they say must be accorded to the former Nevada statute, repealed in 1977. Here, however, any such presumption is weakened because the Nevada (as well as the Alabama) legislature itself has repealed the mandatory statute. See n.41, *infra*. Further, once it is seen, as discussed below in Part I, that the statutes are at odds with the Court's previous Eighth Amendment pronouncements, any such presumption fades and the onus shifts to the petitioners to show that the statutes are not constitutionally infirm. See discussion in Part II B, *infra*.

In any event, the language in *Gregg v. Georgia*, 428 U.S. 153, 175 (1976), on which petitioners exclusively rely in contending that a presumption of validity applies here, was addressed to a legislative determination that the death penalty was an available punishment. The question the Court discussed there was whether the death penalty was unconstitutional *per se*. The Court in *Gregg* said nothing about judicial deference to the legislative selection of the procedures by which such a penalty could be applied. A determination of whether legislatively prescribed procedures satisfy constitutional requirements is within the particular province, not of the legislature, but of the judiciary. See n.1, *supra*.

stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 304 (Opinion of Stewart, Powell & Stevens, JJ.).

It therefore held that:

[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles*, 356 U.S. at 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death.

Id. (emphasis added).

The following term, the Court held that the rationale of *Woodson* constitutionally precludes the mandatory imposition of the death penalty "even where the crime of first-degree murder is narrowly defined" as the intentional murder of peace officers. *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 636 (1977). The Court clearly stated that, although a state has a special interest in protecting the lives of its public servants, *id.* at 636, such an interest does not justify precluding consideration of any "particularized mitigating factors" concerning the offender or the offense, *id.* at 637.

In *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 113-17 (1982), "which followed naturally from [the Court's] decision in *Woodson*,"⁴ the Court held that before the death penalty may be imposed

⁴ *Skipper v. South Carolina*, ____ U.S. ____, 106 S. Ct. 1669, 1675 (1986) (Powell & Rehnquist, JJ. and Burger, C.J., concurring).

the sentencer must be allowed to consider "all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances" (emphasis added).⁵

The central lesson of these cases is that, if death penalty procedures are to ensure reliability in the sentencing determination, they must allow the sentencer to consider and weigh all the relevant evidence. The mandatory statutes under which respondent and amici were convicted fail the test of reliability. By precluding consideration of any and all mitigating evidence, they forced the sentencers to ignore factors relevant—indeed essential—to the determination of whether death was the appropriate punishment for the life-term inmates who were convicted of murder. They prevented the weighing of mitigating against aggravating circumstances, *Eddings v. Oklahoma*, 455 U.S. at 117, and thereby "create[d] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. at 605. "When the choice is between life and death that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Id.*

A. The Mandatory Statutes Precluded Consideration of A Broad Range of Relevant Mitigating Circumstances.

The implicit rationale behind the mandatory statutes was that any person who had committed an offense for which he was sentenced to a life term and who thereafter committed murder invariably deserved to die. It is against this

⁵ *Eddings v. Oklahoma*, 455 U.S. at 117; see also *California v. Brown*, No. 85-1563, slip op. at 1 of Opinion of Justice O'Connor, concurring (U.S. January 27, 1987) ("a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense"); *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (Stewart, Powell & Stevens, JJ.) ("A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed").

background that petitioners contend that the mandatory statutes allowed adequate consideration of the circumstances of the offenses and the character and record of the respondent.⁶ Petitioners, however, are wrong. The only aspects of the defendant's character and record that could be considered were *aggravating* factors. See Brief of Petitioners at 22-30.⁷ The mandatory statutes prohibited the sentencer from considering relevant mitigating and distinguishing evidence that, but for the preclusive effect of the statutes, may well have been determinative of the sentencing judgment. By requiring the sentencer to ignore such evidence, the statutes made self-fulfilling their assumption that the persons to whom the statutes applied were indistinguishable.

⁶ See Brief of Petitioners at 15-30. In making this argument the petitioners rely primarily on dicta in *Woodson*, 428 U.S. at 287 n.7 and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 334 n.9 (1976). In those cases, the Court, in reserving judgment on the constitutionality of a mandatory statute for life-term inmates convicted of murder, described the statutes as applying to a crime defined in part in terms of the character and record of the defendant. These statements were made, however, prior to this Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), in which the Court held that the sentencer must not be precluded from considering *any* and *all* relevant *mitigating* evidence. Neither in, nor since, *Lockett* did the Court refer to the mandatory statutes as defining the crime in part by the character or record of the defendant. In *Lockett*, the last case in which the Court reserved judgment on the constitutionality of these mandatory statutes, the Court based its reservation not on the rationale that such statutes take the defendant's character and record into account, but only on a possible "need to deter certain kinds of homicide." 438 U.S. at 604 n.11. (This "need to deter" suggestion is discussed further in Part II A, below.)

⁷ "[A] sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson* . . . to be required by the Eighth and Fourteenth Amendments." *Jurek v. Texas*, 428 U.S. at 271 (Stewart, Powell & Stevens, JJ.).

A review of (1) the circumstances of, and the degree of the *amici's* culpability for, the predicate life-term offenses, (2) the circumstances of, and the degree of the *amici's* culpability for, the murders prosecuted under the mandatory statutes, and (3) the many mitigating aspects of *amici's* characters and records refutes petitioners' contention that the statute at issue applied narrowly. See Brief of Petitioners at 22. The mandatory statutes condemned not only those who have unredeemable characters and have committed the most reprehensible offenses, but also those who, based on their characters and records, do not deserve to die.

1. The Mandatory Statutes Encompassed An Extremely Broad Range of Predicate, Life-Sentence Offenses.

A life term may be imposed for a wide variety of offenses. Some persons serving life terms have never committed crimes of violence. Indeed, crimes punishable by life terms in some states would be considered misdemeanors or petty offenses in others. The mandatory statutes encompassed all of these crimes as predicate offenses. Furthermore, merely identifying the crime for which a defendant was previously sentenced to a life term fails to reveal the wide variety of circumstances under which that crime was or was alleged to have been committed. See *Furman v. Georgia*, 408 U.S. 238, 402 (1972) (Burger, C.J., dissenting) (quoted in *Woodson v. North Carolina*, 428 U.S. at 298 and *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 333) ("individual culpability is not always measured by the category of crime committed").

Statistics assembled by the United States Department of Justice show that over 35 percent of the life terms imposed in this country in 1982 were for crimes other than murder. Over 13 percent were for drug-related offenses, 9.8 percent for robbery, and 6.9 percent for rape and other sexual assaults. Other life terms were being served for manslaughter, assault, burglary, larceny, for-

gery, fraud, embezzlement and other property offenses. Almost one percent of the life terms were being served for offenses against public order.⁸

In addition, state legislatures have broad discretion to make many crimes—violent or not—punishable by life imprisonment.⁹ Thus, the broad range of crimes punishable by life imprisonment may be expanded at any time.

The facts of the Johnny Harris case reveal the many mitigating circumstances that can be associated with life term offenses. As a result of a plea bargain in 1970, Mr. Harris simultaneously was given five life sentences—four for robberies in the amounts of \$11.00, \$67.00, \$90.00 and \$205.00 and one for the rape of a white woman.¹⁰ At the time of Mr. Harris's arrest on all five charges, both robbery and rape were capital offenses, punishable by death under Alabama law.¹¹ Mr. Harris pled guilty to the offenses and received life sentences in exchange for a prosecutorial promise not to seek the death penalty.¹²

⁸ S. Minor-Harper and L.A. Greenfeld, Bureau of Justice Statistics, Special Report, Prison Admissions and Releases, 1982 (1985), at 10, Table 15. The Department of Justice has not yet compiled these statistics for years subsequent to 1982.

⁹ See *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding life term for convictions for fraudulent use of credit card, passing a forged check, and obtaining money under false pretenses); cf. *Solem v. Helm*, 463 U.S. 277, 290 (1983) (overturning as disproportionate life term for convictions for third degree burglary, obtaining money under false pretenses, grand larceny, and third degree driving while intoxicated).

¹⁰ The alleged facts of these crimes were never fully revealed because of the plea bargain.

¹¹ See Ala. Code of 1940, Title 14, § 395 (rape) and § 415 (robbery).

¹² Mr. Harris would have been eligible for later prosecution under the mandatory statute had he been charged with and given a life sentence for only the robbery of \$11.00.

Thus Mr. Harris received a life sentence even though he committed no murder.¹³ Moreover, in a subsequent capital sentencing proceeding, Mr. Harris could have produced evidence that cast substantial doubt on his guilt with respect to these predicate offenses. He would have been entitled to show that he was arrested on these multiple, predicate charges because of racial animus.¹⁴

Mr. Harris could also have produced evidence that he agreed to plead guilty and to accept life sentences, not because of any independent assessment of the merits of the cases against him, but upon the advice of his court-appointed counsel, simply to avoid the risk that the death penalty would be imposed.¹⁵ A sentencer given the opportunity could well have concluded that any negative inferences that could be drawn from the fact Mr. Harris was serving life terms were insufficient to justify sending him to the electric chair.

Even in cases where the predicate crime was a murder, the factual circumstances under which that crime was com-

¹³ This Court, subsequent to Mr. Harris' guilty pleas but before his current conviction under the mandatory statute, had ruled that crimes other than murder could not constitutionally be punished by death. See *Coker v. Georgia*, 433 U.S. 584 (1977). A sentencer allowed to consider the circumstances of Mr. Harris's predicate offenses could have concluded and found mitigating the fact that, but for the risk of the unconstitutional imposition of the death penalty for robbery or rape, a different plea bargain and a sentence less than life in prison might have resulted. Mr. Harris in that instance would never have been a candidate for the death penalty under the mandatory statute.

¹⁴ In 1970, Mr. Harris, a black man, moved with his family into a previously all-white neighborhood in Birmingham, Alabama. Prior to his arrests, his home and property were vandalized; crosses were burned on his lawn. Shortly thereafter, he was arrested on all five unrelated charges, despite the fact he had firm alibis. Mr. Harris has consistently maintained that he was innocent and was charged for these crimes in order to drive his family from the neighborhood.

¹⁵ See *Ex parte Johnny Harris*, 367 So. 2d 524, 529 (Ala. Crim. App. 1978), cert. denied, 367 So. 2d 534 (Ala. 1979).

mitted have great relevance in assessing whether a defendant deserves to live.¹⁶ Mr. Thigpen's predicate offense was murder. Yet, the murder occurred during an argument with his common law wife, as he was being evicted by a housing authority official from the apartment he and his wife shared with their young children. At a subsequent capital sentencing proceeding, Mr. Thigpen could have introduced evidence that, immediately after his gun discharged, he left the apartment, flagged down a passing police car, and brought the officer to the scene where he relinquished possession of his weapon and voluntarily submitted to arrest.¹⁷ In a separate sentencing phase the sentencer could have accorded weight to Mr. Thigpen's consistent assertion that the killing was accidental. He was given no opportunity to affect his sentence by proving these facts.

As shown above, the life terms that qualify a person for application of the mandatory statutes can be imposed for a broad category of distinguishable crimes—some violent, some not; some involving a killing, some not. Yet, under the mandatory statutes, all these life sentences were required to be given equal weight.

2. The Facts of the Murders Can Be Widely Divergent and Involve Many Relevant Mitigating Circumstances.

Just as the predicate offenses leading to an initial life term may differ widely, the circumstances surrounding the killings for which the death penalty has been mandatorily imposed differ dramatically. That a life-term inmate was convicted of murder reveals little about the circumstances underlying the conviction. The motivation for the killing,

¹⁶ Cf. *Enmund v. Florida*, 458 U.S. 782 (1982) (non-triggerperson may not be given the death penalty absent intent to kill); *id.* at 827-31 (O'Connor, J., dissenting) (minor role in the crime deserves consideration); and see discussion *infra* at 13-14.

¹⁷ Cf. *Godfrey v. Georgia*, 446 U.S. 420 (1980).

the degree of the defendant's participation and culpability and the manner in which the killing occurred will vary widely from case to case.

Johnny Harris repeatedly has asserted that he himself never committed the murder of the prison guard for which he is sentenced to die. Nor did the jury find otherwise; Mr. Harris was convicted for his participation in a prison uprising during which a guard was murdered by other inmates. The jury never found that Mr. Harris actually killed the guard, but instead acted pursuant to an instruction allowing them to find him guilty merely for aiding and abetting the crime. Mr. Harris claims that he was forced to participate in the initial stages of the uprising by its revolutionary leaders—who threatened him with death if he refused—and that his participation thereafter ceased.¹⁸

At the time of the uprising in 1974 there was a moratorium (in light of *Furman v. Georgia*) on prosecutions under Alabama's general death penalty statute. The state selected Mr. Harris for capital prosecution—not because he was particularly implicated in the uprising or the killing of the guard—but because he was the only one of the participants in the uprising who was serving a life term and could be prosecuted under the mandatory statute. Unlike Mr. Harris, those who did the actual killing and who had forced his limited participation in the uprising were sentenced only to a term of years or a life term—not to

¹⁸ The prison uprising was precipitated by conditions which, in this and other Alabama prisons, were later declared unconstitutional and found to violate the cruel and unusual punishments clause. See, e.g., *Newman v. Alabama*, 349 F. Supp. 278 (M.D. Ala. 1972), *aff'd in part*, 503 F.2d 1320 (5th Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd with modifications sub nom.*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part and remanded sub nom.*, *Alabama v. Pugh*, 438 U.S. 781 (1978); *Newman v. Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979).

die.¹⁹ This anomaly resulted solely from the existence and operation of Alabama's mandatory statute. But for operation of the Alabama statute, the circumstances and the limited degree of Mr. Harris's involvement in the prison uprising and the guard's death could well have been determinative.

Similarly, Donald Thigpen has contended that his involvement in the murder for which he received a mandatory death sentence was peripheral at most. Mr. Thigpen and several other inmates escaped from prison. The next day, Mr. Thigpen and a fellow escapee, Pedro Williams, observed a farmer park his truck on a rural road. Both Mr. Thigpen and Mr. Williams testified that, while Thigpen hid in a ditch across the road, Williams approached the farmer, intending to steal the truck. After a brief exchange, Williams abruptly struck the farmer with a post, evoking a protest from Thigpen. Before the two left in the truck, Mr. Thigpen helped Mr. Williams carry the farmer, who appeared to be alive, to a nearby house. Mr. Thigpen was given no opportunity to affect his sentence by explaining his version of these facts. The sentencer was prohibited from considering that Williams was convicted only of second degree murder and sentenced to a term of years.

This Court held in *Enmund v. Florida*, 458 U.S. 782 (1982), that the death penalty may be imposed only upon a defendant who actually killed or intended that a killing occur. The Court has also recognized that "[s]ociety's legitimate desire for retribution is less strong with respect to a defendant who played a minor role in the murder for which he was convicted." *Skipper v. South Carolina*, 106 S. Ct. at 1675 (Powell & Rehnquist, JJ. and Burger, C.J.,

¹⁹ See *Heard v. State*, 351 So. 2d 686 (Ala. Crim. App. 1977) (life term); *Johnson v. State*, 335 So. 2d 663 (Ala. Crim. App.), *cert. denied*, 335 So. 2d 678 (Ala. 1976) (term of 31 years).

concurring).²⁰ Accordingly, "a sentencer must consider any relevant evidence or argument that the death penalty is inappropriate for a particular defendant because of his relative lack of *mens rea* and his peripheral participation in the murder." *Enmund v. Florida*, 458 U.S. at 828 (O'Connor, J., dissenting, joined by Burger, C.J. and Powell & Rehnquist, JJ.). Mandatory statutes present an irreconcilable conflict with these pronouncements because they blind the sentencer to all evidence of reduced culpability. The amici had no chance to show that the facts in their cases, whether or not they established amici were innocent of murder, mitigated greatly the degree of their responsibility and should affect the determination of whether they should die.

Factors other than those portrayed by amici's own cases may also be relevant in distinguishing one case from another and may affect the determination of whether the death penalty is an appropriate punishment for a particular murder. Whether the crime was provoked or whether the victim shared some culpability,²¹ as well as whether the

²⁰ See also Ala. Code of 1975, § 13A-5-51 (1985) (statutory mitigating factors include whether defendant was "under the influence of extreme mental or emotional disturbance"; whether the "capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"; and whether the "defendant acted under extreme duress or under the substantial domination of another person"); *California v. Brown*, No. 85-1563, slip op. at 2 of Opinion of Justice O'Connor (mitigating evidence admissible to show defendant is less culpable than others); *Lockett v. Ohio*, 438 U.S. at 597, 608 (Opinion of Burger, C.J., for the plurality) (Ohio statute flawed, in part because it did not permit consideration of the defendant's "relatively minor part in the crime"); *id.* at 613-17 (Blackmun, J., concurring) (same).

²¹ As this Court is well aware, prisons are places where violence and threats of violence over sexual favors, property and other matters are quite commonplace. See *United States v. Bailey*, 444 U.S. 394, 419-36 (1980) (Blackmun, J., dissenting); *id.* at 415 n.11 (majority opinion), 417-19 (Stevens, J., concurring). A myriad of circumstances may explain why one prisoner, like respondent, might attack another.

crime was a product of mental deficiency or was believed by the defendant to be morally justified, see *Lockett v. Ohio*, 438 U.S. at 608, are all factors that could make death inappropriate in a particular case. Yet, under the mandatory procedure the sentencer might well have never known of such factors, and in any event, was precluded from considering them.

3. The Characters and Records of Life-Term Inmates Who Are Convicted of Murder May Reflect Significant Mitigating Circumstances.

The characters and records of life-term inmates who commit murder vary widely. Not all who have been condemned by mandatory statutes are hardened, unredeemable criminals. Circumstances in these defendants' backgrounds may greatly diminish their culpability. This must be taken into account by the Court in assessing whether the mandatory statutes—which precluded any and all consideration of this evidence—constitutionally determined who was to die.²²

In Mr. Thigpen's case, it could be shown that he is of extremely limited intelligence and education, had a very difficult family history, and possibly is a victim of profound psychological disturbance.²³

²² The relevance of such mitigating evidence is not, as petitioners contend, limited to a showing that the defendant's character or record is "good." See Brief of Petitioner at 29. Rather, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, No. 85-1563, slip op. at 2 of Opinion of Justice O'Connor, concurring.

²³ See *Skipper v. South Carolina*, 106 S. Ct. at 1675 (Powell & Rehnquist, JJ. and Burger, C.J., concurring) and Ala. Code of 1975, § 13A-5-51(6) (1985) (defendant's limited intellectual capacity is a mitigating circumstance that must be considered).

In Mr. Harris's case, had he not been forbidden by the statute, he could have produced mitigating evidence demonstrating:

- his continuing close contacts with, his extraordinary care for, and the important role he plays in the lives of an unusually large number of family members and friends;
- his remorse about involvement in the prison uprising;
- a successful employment history prior to incarceration;
- his potential for rehabilitation demonstrated in the years since the prison uprising, including a favorable disciplinary record, his positive involvement in prison activities and religious studies, and his artistic and creative talents; and
- his very difficult childhood, including the fact that his mother was murdered in his presence while Harris was very young.

Other relevant mitigating circumstances that could affect whether death is an appropriate punishment in a particular case include whether the defendant has a record of successful military service; how he has conducted himself in prison since the offense; and his age.²⁴ Mandatory statutes precluded consideration of any and all of these mitigating—and potentially determinative—factors.

B. Mitigating Factors Can Be of Sufficient Force to Outweigh The Aggravating Fact of Murder By A Life-Term Inmate.

Chief Justice Rehnquist previously has expressed the view that "[t]he question is not whether mitigating factors

²⁴ See *Skipper v. South Carolina*, 106 S. Ct. at 1671 (conduct in prison); *Eddings v. Oklahoma*, 455 U.S. at 115-16 and Ala. Code of 1975, § 13A-5-51(7) (1985) (age).

might exist, but, rather, whether whatever 'mitigating' factors that might exist are of sufficient force so as to constitutionally require their consideration as counterweights to the admitted aggravating circumstance." *Roberts (Harry) v. Louisiana*, 431 U.S. at 648-49 (dissent) (emphasis in original). In whatever form the question is best stated, consideration of mitigating circumstances is constitutionally required if the presence of those factors could affect whether death is the appropriate punishment in a particular case.²⁵ There is simply no basis for concluding that the broad range of mitigating circumstances discussed above can never outweigh the statutorily-incorporated aggravating ones.

That mitigating circumstances can and do outweigh the aggravating factors in these cases is graphically illustrated by the experience in Alabama. Since at least 1959, every single Alabama jury afforded the discretion to decide whether a life-term inmate who murdered should live or die concluded that there were mitigating circumstances that outweighed the aggravating ones. In every case brought under Alabama's discretionary statute, the jury determined that life or life without parole was the appropriate sentence.²⁶ Were it the case that no mitigating cir-

²⁵ *Eddings v. Oklahoma*, 455 U.S. at 113-17; *Lockett v. Ohio*, 438 U.S. at 601, 604, 605; *Woodson v. North Carolina*, 428 U.S. at 302-05.

²⁶

Year	Alabama statute under which life-term prisoner indicted for first degree murder	Available Statutory Punishment	Sentence Imposed
1959	§318 (discretionary)	Life or Death	Life
1968	§318 (discretionary)	Life or Death	Life
1969	§318 (discretionary)	Life or Death	Life
1974	§319 (mandatory)	Mandatory Death	Death
1975	§319 (mandatory)	Mandatory Death	Death

(footnote continued)

cumstances could ever outweigh the aggravating ones where life-term inmates commit murder, all of these defendants would have been sentenced to die. Only where the choice was removed from the sentencer were Alabama life-term inmates who were convicted of murder sentenced to death.

Mandatory statutes thus created the "risk that the death penalty [was] imposed in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. at 605. They provided no assurance that the ultimate sentence was imposed only on those for whom death was "the appropriate punishment in a specific case." *Id.* at 601, 604, 605, quoting *Woodson v. North Carolina*, 428 U.S. at 305. In the face of this uncertainty and ambiguity, respondent's sentence cannot be allowed to stand. See *Eddings v. Oklahoma*, 455 U.S. at 104 (O'Connor, J., concurring).²⁷

1977	§13-11 (discretionary)	Life w/o parole	Life w/o
	-2	or Death	parole
1977	§13-11 (discretionary)	Life w/o parole	Life w/o
	-2	or Death	parole
1977	§13-11 (discretionary)	Life w/o parole	Life w/o
	-2	or Death	parole

Data supplied by Clyde V. Myers, Director of Inmate Records of the Alabama Board of Corrections. (Record in *Thigpen v. Hopper*, Civ. A. No. 82-0456-H (S.D. Ala.) (federal habeas proceeding). See also *Bester v. State*, 362 So. 2d 1282 (Ala. Crim. App. 1978) (life-term defendant charged with murder pled guilty and received life term in 1978).

As this evidence shows, except for *awiei* Harris and Thigpen, all Alabama defendants charged with committing murder while serving a life term have been indicted under a statute affording sentencer discretion.

²⁷ This Court has insisted that capital sentencing procedures allow principled distinctions to be drawn between those to whom a death sentence is applied and those to whom it is not. See, e.g., *Zant v. Stephens*, 462 U.S. 862, 873-80 (1983), citing *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 189-95 (1976) (Opinion of Stewart, Powell & Stevens, JJ.). Mandatory statutes—which required ignorance of all but a few of the many factors relevant to a

(footnote continued)

II. The Mandatory Statutes Do Not Justify Exception From The Eighth Amendment Requirement of Individualized Consideration.

Because the mandatory statutes do not allow adequate particularized consideration, they are unconstitutional unless an exception to Eighth Amendment requirements is justified. As all scholars who have analyzed this issue have recognized, there is no persuasive justification for distinguishing, under the Eighth Amendment, between statutes mandating death for life-term inmates who murder and those mandating death for any other first-degree murderers.²⁸

determination of who does or does not deserve to die—failed to ensure that this principled distinction could be made. Indeed, a mandatory procedure ensured that a principled distinction *could not* be made. Mandatory statutes deprived defendants of a procedure whereby they could show that death was not the appropriate punishment in their particular cases—a deprivation the Eighth and Fourteenth Amendments do not condone. See *Ford v. Wainwright*, ___ U.S. ___, 106 S. Ct. 2595 (1986) (opportunity must be afforded for inquiry into sanity of condemned inmate), quoting *Sollesbee v. Balkom*, 339 U.S. 9, 23 (1950) (Frankfurter, J., dissenting) ("[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected"); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (defendant must be given an opportunity to deny or explain information on which the death penalty determination is based). By precluding any opportunity for the presentation of distinguishing and potentially mitigating evidence, the mandatory statutes gave the impression that they ensured consistent sentencing for life-term inmates who murdered. However, "a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, 455 U.S. at 112.

²⁸ See, e.g., Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Calif. L. Rev. 317, 323 (1981); Gillers, *Deciding Who Dies*, 129 U. Pa. L. Rev. 1 (1980); Note, *The Constitutionality of the Mandatory Death Penalty for Life-Term Prisoners Who Murder*, 55 N.Y.U. L. Rev. 636 (1980); accord *Woodson v. North Carolina*, 428 U.S. at 321 (Rehnquist, J., dissenting).

A. Any Legitimate Penological Interests Can Be Satisfied Without Abrogating Eighth Amendment Requirements.

The petitioners contend that it is "necessary" that life-term inmates who commit murder be excepted from the Eighth Amendment rule that the sentencer must not be precluded from considering any and all relevant mitigating evidence.²⁹ However, any legitimate state interests and the Eighth Amendment requirement of individualized consideration can simultaneously be satisfied through use of a discretionary sentencing procedure; no choice between them need be made. A mandatory procedure is not necessary to accomplish the state's legitimate penological goals.

1. No Life-Term Inmate Is Immune From Punishment Under a Discretionary Procedure.

One possible question that might underly the mandatory statutes is whether life-term inmates who commit murder will be immune from punishment if the death penalty is not automatically imposed.³⁰ A discretionary procedure, however, does not immunize life-term inmates from punishment.

²⁹ Brief of Petitioners at 8, 15, 16 and 45-47. Petitioners assert, without any support, that the Nevada legislature once "determined that the mandatory death sentence was necessary for the protection of the men and women living and working within the walls of the Nevada State Prison." Brief of Petitioners at 8; see also *id.* at 45-47. There is no basis for concluding that the Nevada legislature ever thought the statute was truly "necessary," particularly given that the same legislature later voluntarily repealed it (a fact petitioners entirely ignore).

³⁰ This apparently is the concern that the Court previously referred to in reserving judgment on the question presented here today. See *Lockett v. Ohio*, 438 U.S. at 604 & n.11 (referring to the "need to deter"); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 334 n.9 (the situation presents "a unique problem").

a. Those Life-Term Inmates Who Deserve To Die Will Be Condemned Under a Guided Discretion Sentencing Scheme.

A guided discretion sentencing scheme permits sentencers to inflict the death penalty on those life-term inmates who commit murder and who—in light of all the relevant facts of their predicate offenses, the murder and their characters and records—deserve to die. While death may be an appropriate punishment for many life-term inmates who commit murder, there also will be cases, as discussed above, in which death is not justifiable. Imparting guided discretion to sentencers does not immunize life-term murderers from the ultimate punishment. Rather, it ensures that whatever punishment is meted out will truly be appropriate. As the Court has recognized, "the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death." *Gardner v. Florida*, 430 U.S. at 360.³¹

b. Effective Punishments Other Than Death Can Be Imposed on Life-Term Inmates Who Murder.

Many punishments other than death are available and their specter can act as a significant deterrent to murder by life-term inmates. For instance, where, as under the

³¹ Dissenting in *Roberts (Stanislaus) v. Louisiana*, 428 U.S. at 358-59, Justice White voiced concern that implicit in the plurality's condemnation of mandatory statutes was a holding "that States are constitutionally prohibited from considering any crime, no matter how defined, so serious that every person who commits it should be put to death regardless of extraneous factors related to his character." See also *Roberts (Harry) v. Louisiana*, 431 U.S. at 644-45 (Rehnquist, J., dissenting). The cases requiring particularized consideration need not, however, be read so broadly. Nothing in this Court's decisions enforcing the Eighth Amendment requirement of individualized consideration precludes sentencing judges and juries from imposing the death sentence—after particularized consideration—in each and every case in which, for instance, a prison official or a police officer has been intentionally murdered.

Alabama statute, the mandatory death provision applies to those serving life with the possibility of parole, revocation of any and all possibility of parole is a significant, available punishment.³² Whether the inmate has been serving straight life or life without parole, the possibility of losing all chance for clemency or commutation is another available and significant punishment and deterrent. Additional available punishments include long-term solitary confinement or isolation, loss of the privilege of visitations by and communication with family and friends and the loss of other valuable privileges available to other life-term prisoners.

While in some of these cases these alternative punishments may be deemed an inadequate penal response, there will be other cases in which one of these punishments, and not death, will be a sufficient penalty for the particular defendant and crime. A state's interest in seeing that there is a punishment for and therefore a deterrent to every crime accordingly does not justify the overly broad step of foreclosing other penalties and making death mandatory in all of these cases.

2. The Need for Deterrence Does Not Justify the Mandatory Statutes.

Contrary to petitioners' assertion, Brief of Petitioners at 45-47, the need to deter prison murders does not justify the former Nevada statute. Petitioners provide no evidence—because there is none—that the specter of a mandatory death sentence provides any greater deterrent to murder by life-term inmates than does the possibility of a death sentence under a discretionary procedure. Indeed, all available evidence is to the contrary.³³ In Alabama in

³² That the Alabama statute applies even to those serving life with the possibility of parole distinguishes amici's cases from respondent's.

³³ See, e.g., Acker, *Mandatory Capital Punishment for the Life Term Inmate Who Commits Murder: Judgments of Fact and Value in Law*

(footnote continued)

the period since 1980, when the death penalty was made discretionary for all life-term inmates who commit murder, the number of murders by life-term inmates has not increased, but has declined.³⁴ The persuasiveness of this evidence almost certainly explains why no state—not even Nevada or Alabama—any longer uses a mandatory procedure to deter prison homicides.

That mandatory statutes provide no enhanced deterrence is not surprising given that no mandatory statute

and Social Science, 11 New England J. on Crim. and Civil Confinement 267, 282, 290-91 & n.48, 293-96 (1985); Wolfson, *The Deterrent Effect of the Death Penalty Upon Prison Murder*, in *The Death Penalty in America* 159, 170 (H. Bedau 3d ed. 1982); W. Bowers, *Executions in America* 147-57, 160-63 (1974).

Moreover, there is no justification for singling out life-term inmates for special treatment for prison murders. Petitioners refer to evidence that murders of staff and inmates within correctional institutions are a significant problem. Brief of Petitioners at 46. That evidence, however, does not distinguish between murders by life-termers and those by other inmates. In fact, the evidence suggests that death-row and life-term inmates are less likely to commit murder in prison than are other prisoners. See, e.g., Auerbach, *Common Myths About Capital Criminals and Their Victims*, 3 Ga. J. Corrections 41, 45-47 (1974). Petitioners' rationale therefore provides no justification for a mandatory statute addressed only to life-term inmates who, according to the evidence, are not the ones who exclusively or even predominantly commit those murders.

Nor do life-term inmates have less to lose by committing murder than do inmates serving a term of years. In Alabama, for instance, a life-term inmate may be eligible for parole after he or she has served ten years. Inmates serving a term of years may be eligible for parole after one-third of their sentence has been served, or after ten years, whichever is less. Alabama Board of Pardons and Paroles, *Annual Report 1985-86* 14 (1986). Therefore, a life-term inmate is eligible for parole at the same time as one serving a term of 30 years or more and has no less to lose by committing another crime.

³⁴ Indeed, according to Alabama prison officials, since 1980 no murders by life-term inmates have occurred. (Based on telephone conversation with Charles Simmons, Alabama Department of Corrections, January 14, 1987; notes available upon request).

can guarantee that a life-term inmate who commits murder will be put to death. Even under a mandatory scheme, a death sentence will not be imposed unless the prosecution exercises its discretion to seek an indictment under the mandatory, as opposed to a discretionary, statute; unless the grand jury chooses to render the indictment under the mandatory statute; unless the case is not plea bargained for a lesser sentence; unless the jury or judge does not convict the inmate of a lesser offense than first-degree murder; unless the sentence is not overturned because of errors in the trial; and unless the sentence is not commuted by the state executive. Thus, making the death penalty mandatory does not in fact mean "punishment, in the form of death, will be inexorable," *Roberts (Harry) v. Louisiana*, 431 U.S. at 647 (Rehnquist, J., dissenting); it means only that the discretion to decide who shall live and who shall die is shifted from sentencers to those whose decisions are wholly unreviewable.

3. The Seriousness of the Offense Does Not Justify A Mandatory Procedure.

Another asserted justification for the mandatory statutes is the need to protect prison guards and inmates. See Brief of Petitioners at 45-47. Yet, since mandatory statutes do not provide any greater deterrent to murder by life-term inmates than do discretionary statutes (see Part II A 2, *supra*), and since those who deserve to die will be condemned even under discretionary procedures (see Part II A 1, *supra*), petitioners' argument reduces to a claim that the mandatory penalty is invariably justified because of the seriousness of the murder.³⁵ This argument was rejected in *Roberts (Harry) v. Louisiana*, 431 U.S. 633

³⁵ See *Roberts (Harry) v. Louisiana*, 431 U.S. at 644 (Rehnquist, J., dissenting) (describing murder of a police officer as a "far more serious crime" than first-degree murders generally). Of course, the statutes at issue here did not apply only to murders of prison guards, but also to murders of inmates and private citizens.

(1977). There the Court held that—regardless of the need to deter, exact retribution for and punish murders of peace officers, including prison officials—a mandatory statute addressed to intentional murders of such officials cannot be condoned under the Eighth Amendment.³⁶

The issue presented here is not whether the state is "entitled to vindicate its substantial interests in protecting the foot soldiers of an ordered society," *Roberts (Harry) v. Louisiana*, 431 U.S. at 642 (Rehnquist, J., dissenting), but whether the *procedure* by which the state sought to vindicate that interest is consistent with the Constitution. The mandatory procedure at issue here fails to meet that constitutional test.

B. The Eighth Amendment Requirement of Individualized Consideration Cannot Be Outweighed By State Interests.

Petitioners in effect argue that the alleged need for certainty and efficiency in the punishment of murders by life-term inmates should take precedence over the risk that the death penalty will be imposed on individuals who otherwise would not be selected to die. This same type of argument has been raised and rejected in other cases where constitutional principles proscribed the conduct of the states. See, e.g., *Chambers v. Florida*, 309 U.S. 227, 240-41 (1940).³⁷ It likewise must be rejected here. Petitioners'

³⁶ The circumstances of many murders, such as torture or mass murders, may make them no less and indeed more heinous and serious than a shooting of a prison guard or an inmate. Yet, this Court's previous pronouncements make clear that even in such cases the Constitution requires guided discretionary sentencing procedures that comport with the Eighth Amendment. See *Gregg v. Georgia*, 428 U.S. at 201 (describing *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974), as "a horrifying torture-murder").

³⁷ In *Chambers*, the Court stated:

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws.

(footnote continued)

argument that a mandatory statute is "necessary" is not enough to trump the constitutional requirement of particularized consideration. On the contrary:

Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. . . . [T]here are punishments that the [Eighth] Amendment would bar whether legislatively approved or not.

Furman v. Georgia, 408 U.S. at 313-14 (White, J., concurring).³⁸

Thus, even if the Nevada legislature had at one point in the past concluded that a mandatory statute was nec-

The Constitution proscribes such lawless means irrespective of the end. . . . Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution . . .

309 U.S. at 240-41.

Similarly, in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court rejected the argument that the "burdens which law enforcement officials must bear, often under trying circumstances," *id.* at 481, justified suspension of the privilege against self-incrimination. Quoting Justice Brandeis in dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) ("To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution"), the Court rejected both the argument that the need for confessions justified exception to the Fifth Amendment requirement and the contention that the legislatures should be left to deal with the issues raised. 384 U.S. at 480, 490. "[T]he issues presented are of constitutional dimensions and must be determined by the courts." *Id.* at 490.

³⁸ See also *Gregg v. Georgia*, 428 U.S. at 174 & n.19 (Opinion of Stewart, Powell & Stevens, JJ.) (Eighth Amendment "was intended to safeguard individuals from the abuse of legislative power").

essary, that determination could not stand in violation of the Eighth and Fourteenth Amendments.

III. The Mandatory Statutes Violate Society's Evolving Standards of Decency.

The Nevada and Alabama statutes prescribed a procedure for imposing the sentence of death that is unconstitutionally "cruel and unusual" under the Eighth and Fourteenth Amendments. The mandatory infliction of the death penalty—with no sentencer discretion whatsoever—does not accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).³⁹

In applying the Eighth Amendment in the death penalty context, the Court has relied upon the significant evolution of societal values to strike down numerous punishment schemes. See, e.g., *Woodson v. North Carolina*, 428 U.S. at 301 (Opinion of Stewart, Powell & Stevens, JJ.) (Eighth Amendment and "evolving standards of decency" prohibit mandatory procedures applicable to all who murder).⁴⁰ To assess the contemporary values that give content to the prohibition on cruel and unusual punishment, the Court has recognized that it must look to legislative attitudes and the responses of juries. See, e.g., *id.* at 288.

³⁹ The Eighth Amendment's prohibition on "cruel and unusual punishment" is "progressive, and . . . may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). The Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

⁴⁰ See also *Ford v. Wainwright*, ___ U.S. ___, 106 S. Ct. 2595 (1986) (Eighth Amendment prohibits execution of the insane); *Enmund v. Florida*, 458 U.S. 782, 788-801 (Eighth Amendment prohibits execution of a non-triggerperson who did not intend to kill); *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977) (Eighth Amendment prohibits execution for the crime of rape).

The actions of state legislatures overwhelmingly demonstrate that mandatory death penalty statutes of the type at issue here no longer comport with evolving standards of decency. The simple fact is: *not a single state in the nation currently has such a statute in force.* Of the eleven states that had a mandatory statute applicable to life-term inmates on their books in the 1970's, eight—including Nevada and Alabama—have now legislatively repealed them or revised them so that they permit for sentencer discretion.⁴¹ The state judiciaries in the other three states have declared their mandatory statutes unconstitutional.⁴² At the time this Court decided in *Coker v. Georgia*, 433 U.S. at 596, that evolving standards dictated that the death penalty was disproportionate to the crime of rape, at least a handful of states still provided that a death sentence could

⁴¹ Alabama, Ala. Code of 1975, § 13-1-75 (repealed 1980, current discretionary statute codified at Ala. Code of 1975, § 13A-5-39 *et seq.* (1985)); Indiana, Ind. Ann. Stat. § 10-3401(6)(iv) (Supp. 1973) (amended and codified as a guided discretion statute, Ind. Code Ann. §§ 35-50-2-3, -9 (Burns 1979)); Louisiana, La. Rev. Stat. Ann. § 14:30(3) (West 1974) (amended and codified as a guided discretion statute, La. Rev. Stat. Ann. § 14:30 (West 1986)); Mississippi, Miss. Code Ann. § 97-3-19(2)(b) (Supp. 1975) (amended and codified at Miss. Code Ann. §§ 97-3-21, 99-19-101, -103, -105, -107 (Supp. 1986); Nevada, Nev. Rev. Stat. § 200.030 (1)(b) (1973) (current discretionary statute codified at Nev. Rev. Stat. §§ 200.030, .033, .035 (1985) (applicable to any prisoner)); Oklahoma, Okla. Stat. Ann., tit. 21 § 701.1(7) (West Supp. 1973) (repealed 1976, currently codified discretionary statute at Okla. Stat. Ann., tit. 21 §§ 701.7, 701.9-.15 (West 1983)); Virginia, Va. Code §§ 18.2-10, -31(c) (murder by any prisoner), § 53-291(1) (murder of prison employee by inmate) (1975), § 18.2-10 was amended in 1977, and § 53-291(1) was repealed, current discretionary statute codified at Va. Code §§ 18.2-10, -31(c), 19.2-264.2 to .4 (1982)); and Wyoming, Wyo. Stat. Ann. § 6-54(b)(v) (Supp. 1973) (current discretionary statute codified at Wyo. Stat. §§ 6-2-101 to -103 (1977)).

⁴² See *Graham v. Superior Court*, 98 Cal. App. 3d 880, 160 Cal. Rptr. 10 (1979) (California); *People v. Smith*, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984), *cert. denied*, 469 U.S. 1227 (1985) (New York); *State v. Cline*, 121 R.I. 299, 397 A.2d 1309 (1979) (Rhode Island).

be imposed for that crime. Here, the states are unanimous in their abandonment of a mandatory procedure.

The treatment of the mandatory statute by the Alabama legislature is particularly telling.⁴³ Although this Court had plainly reserved the issue of the constitutionality of these statutes and although the Alabama Supreme Court had held that the Alabama mandatory statute was constitutional,⁴⁴ the Alabama legislature nevertheless eliminated the rigid sentencing scheme in favor of a system of guided sentencer discretion.⁴⁵ There thus is no basis for arguing that Alabama's legislative rescission was a product of confusion over the constitutionality of such statutes.⁴⁶

⁴³ Section 319 of Title 14 of the Alabama Code of 1940 (recodified 1958) was transferred intact to Section 13-1-75 of the Alabama Code of 1975. Alabama's mandatory statute was then repealed and replaced by a discretionary statute. Ala. Code of 1975, § 13A-5-30 *et seq.* (1980). This repeal did not become effective until 1980. See Colquitt, *The Death Penalty Laws of Alabama*, 33 Ala. L. Rev. 213, 215 n.3 and n.5 (1982).

Alabama's death penalty law was thereafter repealed in whole and replaced by another guided discretion scheme, effective July 1, 1981. Ala. Code of 1975, § 13A-5-39 *et seq.* (1985). The statute now identifies two aggravating circumstances that replace Section 319: (1) that "the capital offense was committed by a person under sentence of imprisonment"; and (2) that "the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person." See Ala. Code of 1975, §§ 13A-5-49(1) and (2) (1985). This delineation of aggravating circumstances implies the legislature recognized that those serving life terms should be treated no differently than others who are incarcerated and that the real relevance of a prior sentence is someone's propensity to violence.

⁴⁴ *Harris v. State*, 352 So. 2d 479 (Ala. 1977).

⁴⁵ Likewise, although the Virginia Supreme Court, after *Woodson*, held that the Virginia mandatory statute was constitutional, *Lewis v. Commonwealth*, 218 Va. 31, 235 S.E.2d 320 (1977), the Virginia legislature nevertheless abandoned its mandatory statute in preference for one which allows sentencer discretion.

⁴⁶ Cf. *Coker v. Georgia*, 433 U.S. 614 (Burger, C.J. & Rehnquist, J.,

(footnote continued)

Jury response in Alabama also strongly supports a finding that the mandatory statute is inhumane. In the last 25 years, the indictments of all but two of the life-term prisoners accused of murder were rendered under a discretionary, as opposed to the mandatory, sentencing statute. In every one of those cases, the defendant received a life sentence.⁴⁷ Under the mandatory statute all would have been sentenced to die.

The few remaining sentences rendered under mandatory statutes are vestiges of a by-gone era. The uniform rejection of these statutes—even in Nevada and Alabama, the last states where any defendants languish under a sentence of death by virtue of such statutes—demonstrates that mandatory statutes no longer comport with evolving standards of decency. They thus contravene the Eighth and Fourteenth Amendments.

CONCLUSION

For the reasons set forth above and in the Brief of Respondent, *amici curiae* respectfully submit that the mandatory statute at issue in this case must be declared unconstitutional and the decision rendered below must be affirmed.

dissenting) (raising possibility that legislative repeal was due to "considerable uncertainty . . . introduced" by the Court's decision in *Furman v. Georgia*).

⁴⁷ See n.26, *supra*. Petitioners fail to address these consistent and overwhelming indicia, from both legislatures and juries, of the evolving viewpoint that mandatory statutes for life-term prisoners who commit murder are out of step with contemporary standards of decency. Petitioners argue only that the death penalty *in general* has been increasingly accepted by legislatures. Brief of Petitioners at 34-36. That argument is irrelevant, however, because it says nothing of the uniform rejection by every state of inflexible mandatory procedures. The issue in this case is not whether the death penalty is unconstitutional *per se*, but whether a mandatory procedure for imposing it comports with Eighth Amendment requirements.

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RESPONDENT'S BRIEF

No. 86-246

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IN THE
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OCTOBER TERM, 1986

GEORGE SUMNER, Director,
Nevada Department of Prisons,
BRIAN MCKAY, Attorney General of Nevada,
Petitioners,

v.

RAYMOND WALLACE SHUMAN,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE RESPONDENT

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SUMMARY OF ARGUMENT

The Eighth and Fourteenth Amendments to the Constitution of the United States require that a death penalty statute be structured so as to avoid the arbitrary and capricious administration of the penalty of death. A sentencer's consideration of any relevant mitigating evidence regarding the character of the defendant and the circumstances of the offense is an indispensable prerequisite to the imposition of the death penalty. Nevada Revised Statute § 200.030(1)(b)(1973), which mandates death for everyone convicted of murder while under a sentence of life imprisonment without possibility of parole, cannot meet the individualized sentencing requirement and therefore violates the Eighth and Fourteenth Amendments.

A Legislature may not conclude that there are certain crimes or defendants that do not deserve to have relevant mitigating evidence presented prior to the imposition of the death penalty. There are always innumerable facts and circumstances relating to the character of the accused and the circumstances of the offense which cannot be foreseen and which may lead to the imposition of a sentence less than death. A statute that precludes consideration of mitigating evidence in capital sentencing is unconstitutional.

ARGUMENT

I. A MANDATORY DEATH PENALTY FOR ALL MURDERS BY INDIVIDUALS SERVING A LIFE SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

On numerous occasions, this Court has held the imposition of the death penalty to exacting scrutiny under the Eighth and Fourteenth Amendments to the Constitution

of the United States. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *California v. Brown*, — U.S. —, 55 U.S.L.W. 4156 (Jan. 27, 1987). The Eighth Amendment provides that "cruel and unusual punishments shall not be inflicted" and the Fourteenth Amendment's due process clause prohibits the infliction of such punishment by a State. *Robinson v. California*, 370 U.S. 660 (1962). The issue in this case is whether Nevada may execute anyone serving a life sentence (without possibility of parole) who subsequently commits a murder, without giving any consideration to relevant mitigating evidence. Respondent respectfully submits that Nevada's statute is unconstitutional.

A. Death Penalty Statutes Which Deny Relevant Mitigating Information To The Sentencer Are Invalid.

The Eighth Amendment jurisprudence of this Court establishes two separate prerequisites to a valid death sentence. First, sentencers may not be given unbridled discretion in determining the fates of those charged with capital crimes. The Constitution requires that death penalty statutes be structured so as to prevent its arbitrary and capricious administration. *Gregg v. Georgia*, *supra*; *Furman v. Georgia*, *supra*. Second, the capital defendant must be allowed to present any relevant mitigating evidence regarding his "character or record and any of the circumstances of the offense." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Consideration of such evidence is a "constitutionally indispensable part of the process" of inflicting the death penalty. *Woodson v. North*

Carolina, 428 U.S. 280, 304 (1976) (plurality opinion);¹ accord *California v. Brown*, *supra*.

The death penalty is permissible only under "a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." *Gregg v. Georgia*, *supra*, at 195. The sentencer must have the opportunity to consider all relevant mitigating evidence. *Lockett*, at 602-08; *Jurek v. Texas*, 428 U.S. 262, 271-72, 276 (1976) (plurality opinion). The Legislature must guide and limit the exercise of sentencing discretion. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). However, it may not foreclose the sentencer's consideration of relevant mitigating information in each particular case. *Lockett*, *supra*; *Eddings*, *supra*, at 113-14 (1982); accord *California v. Brown*, *supra*.

Accordingly, every mandatory death penalty statute reviewed by this Court since 1972 has been declared unconstitutional because such a statute:

"treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

Woodson v. North Carolina, *supra*, at 304. Even when a statute limits the application of mandatory capital punishment to "narrowly drawn categories of first-degree murder," it is unconstitutional because it "affords no meaningful opportunity for consideration of mitigating

¹ The term "plurality opinion" will hereinafter designate the opinions of Justice Stewart, Justice Powell, and Justice Stevens, announcing the judgment of the Court in the five capital punishment cases decided on July 2, 1976.

factors presented by the circumstances of the particular crime or by the attributes of the individual offender." *Roberts v. Louisiana*, 428 U.S. 325, 333-34 (1976).

Nevada's position that its statute is presumptively valid rests in this Court's reservation of the issue *sub judice*. This foundation is inherently untenable since those opinions reserving this issue do not explain *how* any mandatory death penalty statute would be able to meet the 'individualized sentencing' requirement.²

Although Nevada's Legislature may conclude, as a societal value judgment, that some defendants do not *deserve* to have mitigating factors considered, this is no longer a permissible legislative option. See *Jurek v. Texas*, 428 U.S. 262, 271 (1976). Nor may a State Legislature rely on the difficulty of deterring a particular crime as its sole justification for a mandatory death penalty. Any statute that prohibits consideration of relevant mitigating evidence before execution of a sentence of death is unconstitutional. See *Eddings v. Oklahoma*, 455 U.S. 104, 104 S.Ct. 869, 877 (1982); *California v. Brown*, *supra*, at 4157 (O'Connor, J., concurring). Taken together, this Court's death penalty cases clearly require more than a rational, even compelling, legislative conclusion concerning penological justification before a particular death penalty statute may be held to be constitutional.

The constitutional requirement that the sentencers have access to all relevant information therefor cannot be satisfied by merely drafting a mandatory statute to govern only narrow categories of crimes or defendants.

² See Note, *The Constitutionality of the Mandatory Death Penalty for Life-Term Prisoners Who Murder*, 55 N.Y.U.L. Rev. 636 (1980).

For this reason, Nevada's mandatory death penalty statute is invalid.

B. The Eighth and Fourteenth Amendments To The Constitution Of The United States Require Individualized Consideration Of All Relevant Mitigating Evidence Before A Valid Death Sentence May Be Executed.

The cruel and unusual punishment clause of the Constitution of the United States has both procedural and substantive safeguards. The substantive component (relying primarily on *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion), and *Weems v. United States*, 217 U.S. 349 (1910),) requires that a penalty reflect "evolving standards of decency." *Gregg v. Georgia*, 428 U.S. at 173 (Stewart opinion), and that the penalty "comports with the basic concept of human dignity." *Gregg*, at 182 (Stewart opinion). Substantively, the clause prohibits penalties that affront contemporary notions of decency. Such penalties may be either barbaric, excessive or unrelated to the legitimate goals of punishment. *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Roberts (Stanislaus) v. Louisiana*, *supra*, at 327 (1976) (plurality opinion).

The imposition of any death sentence is subject to heightened procedural scrutiny because "death as a punishment is unique in its severity and irrevocability" and is "different in kind from any other form of punishment imposed under our system of criminal justice." *Gregg v. Georgia*, *supra*, at 187-88. As discussed, *infra*, Nevada's mandatory death penalty statute violates the Eighth and Fourteenth Amendments and is constitutionally invalid.

C. Nevada's Mandatory Death Penalty Statute Is Constitutionally Infirm.

Although this Court has reserved the question of the constitutionality of a statute such as Nev. Rev. Stat. §

200.030 (1973), this statute suffers from the same deficiencies as those found dispositive in *Woodson*, *Roberts* (*Stanislaus*), and *Roberts* (*Harry*) v. *Louisiana*, 431 U.S. 633 (1976). Even while reserving this issue in *Lockett*, *supra*, the plurality of this Court stated that "we cannot avoid the conclusion that an individualized decision is essential in capital cases." 438 U.S. at 605. Justice Rehnquist noted in *Woodson* that although the Court "purports to express no opinion as to the constitutionality of a mandatory statute . . . [s]uch a reservation . . . is disingenuous at best." 428 U.S. at 321 (Rehnquist, J., dissenting).

The State argues that its statute is saved by the "consistent repetition" of this mandatory life death penalty exception and that its statute is narrowly drawn so as to define "to a significant degree" the characteristics of the offender and offense to be able to deny a defendant any right to present "any and all mitigating circumstances." (Pet. Br. pp. 15-22). Thus, to begin its analysis by relying on an unexpressed assumption is itself a shaky point of departure. But even if the assumption is conceded, the State analysis fails.

First, the mere fact that SHUMAN was serving a life sentence does not necessarily obviate possible mitigating factors. Persons serving life sentences without the possibility of parole include persons convicted under a variety of crimes and felony-murder classifications. Such persons do not comprise a readily identifiable homogenous class.³ Not all life-term inmates are convicted murderers.

³ E.g., Acker, *Mandatory Capital Punishment for the Life Term Inmate Who Commits Murder: Judgments of Fact and Value in Law and Social Science*, 11 *New England Journal on Criminal and Civil Confinement* 267 (1985).

SHUMAN himself, for example, was not the triggerman in the 1958 killing. Further, SHUMAN was not allowed to present evidence of mitigating factors in 1958 or 1975. Petitioners cannot argue that the mitigating factors in his particular case would have been outweighed by aggravating factors.

Even if the Eighth Amendment could tolerate some narrowly drawn mandatory death penalty statute for certain murders by certain life-term prisoners, Nev. Rev. Stat. § 200.030(1)(b) is far too broad to fit into that narrow category. Subsection (1)(b) does not apply solely to intentional homicides of prison guards by people who have actually killed before, or are incarcerated or in the act of escaping. This statute would apply to an individual who had never actually killed before, who had successfully escaped and led a law-abiding life for 50 years, and who subsequently commits a mercy-killing of his/her spouse. The State's contention that this statute has "individualized consideration" built into its definition is sophistry. This statute does not specify the character of the offender or the circumstances of the offense with such exacting certitudes so as to necessarily eliminate the need to consider mitigating evidence.

The Legislature may reasonably conclude that the death penalty is an option available to the sentencer, but to conclude that it is the only solution to deter a murder being committed by a person serving life without the possibility of parole has no rational basis, and overlooks completely the individualized consideration of the offense committed. There are various factors ranging from outright cold-blooded murder to that caused by provocation, fear, self-defense, or the defense of others. The reasons which lead up to the taking of a life cannot always be fathomed ahead of time. While these factors may not

amount to an absolute defense to the charge, they are factors that a mandatory statute excludes from consideration.

Similarly, a person's conduct, while serving life without possibility of parole is completely excluded under a mandatory death statute. A person who has been in prison for 20 or 30 years may well have performed acts worthy of consideration by a sentencer. He may have saved lives in prison riots, he may have given of himself to be used for new experimental medicines, he may have made immense progress in advancing his education and improving his psychological condition, he may have been a model prisoner with no blemishes on his record. None of the innumerable factors that life can present are brought to the attention of the sentencer under a mandatory statute. With no vehicle for presenting the good aspects of one's life, there is also no incentive for a person to live the life of a model prisoner. It is not that life inmates will try to perform good deeds so they can avoid the death penalty someday, because no one, as a practical matter, plans to kill someone ten years from now. But, if these good deeds are excluded from consideration, a mandatory death statute not only appears arbitrary, it is arbitrary. Thus, the argument that a mandatory death statute is a deterrent is directly related to whether there should be a death penalty at all, not whether it should be mandatory.

It is therefore clear that Nev. Rev. Stat. § 200.030(1)(b), despite its alleged "narrowness," violates the Eighth Amendment. The fact that the defendant has been previously convicted of a crime serious enough to warrant a potential life sentence⁴ may certainly be an aggravating

⁴The "license to kill" argument, that is, that the lifer who is not punishable by death in the event that he murders, is effectively

circumstance that the Legislature can make relevant in sentencing a particular defendant. Nev. Rev. Stat. § 200.030(1)(b) represents an impermissible legislative determination that "no mitigating circumstances can exist" in such a case. *Roberts (Harry)*, 431 U.S. at 636-37.

The Constitution prohibits "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense." *Lockett v. Ohio*, 438 U.S. at 605 (plurality opinion) (emphasis added). The requirement that the sentencer be permitted to give independent weight to the mitigating facts precludes the Legislature from categorically subordinating all such facts to the single aggravating fact that the defendant is a life-term inmate (or parolee). As such, Nevada's attempt at mandatory death penalty legislation fails. Nevada's statute cannot comport with the substantive and procedural analysis of this Court's Eighth Amendment jurisprudence and is unconstitutional.

CONCLUSION

Nevada is now only one of two jurisdictions in the United States authorizing mandatory execution. All the

beyond lawful punishment, cannot be taken at face value. Most, although not all, life-term inmates have realistic prospects for parole. See, *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 30 n. 10 (1979) (Marshall, J., dissenting) (noting that "parole is the method of release for approximately 70% of all criminal offenders returned each year to the community," and that "in some states, the figure is as high as 97%"); *State v. Bolder*, 635 S.W.2d 673, 692 (MO 1983), cert. denied, 459 U.S. 1137 (1983) ("It is common knowledge that, today, 'life' imprisonment is a misnomer. Only a small percentage of inmates with life sentences serve for life." 635 S.W.2d at 692 (Seiler, J., dissenting)).

other post-*Furman* mandatory statutes have been replaced by discretionary statutes and/or declared unconstitutional by State or Federal courts. The status of the offender is now one of many aggravating circumstances sufficient to trigger the possibility of a death sentence. The Nation had reaffirmed its rejection of mandatory death sentences even with this exception. The time is ripe to strike *all* mandatory death sentences down. This statute violates the Eighth and Fourteenth Amendments to the Constitution of the United States. The Opinion of the Ninth Circuit and the Order of the United States District Court for Nevada should be affirmed. The Writ should issue.

Respectfully submitted,

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REPLY BRIEF

APR 9 1987

JOSEPH F. SPANIOLO, JR.
CLERK

No. 86-246

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

GEORGE SUMNER, Director, Nevada Department of Prisons,
BRIAN McKAY, Attorney General of Nevada,
Petitioners,

v.

RAYMOND WALLACE SHUMAN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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No. 86-246

IN THE SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SUMMARY OF ARGUMENT

The briefs of the amici curiae fail
squarely to address the specific statute
and facts at issue herein. The Alabama
law, under which Johnny Harris and Donald

Thigpen were sentenced to death, is not as narrowly drawn as Nevada's statute, Nev. Rev. Stat. § 200.030 (1973) and therefore, their cases cannot fairly be compared to the instant case. Amici curiae have no relevant statistical or factual support for their claim that the Nevada statute in question will invite jury nullification.

Shuman does not have an enumerated constitutional right to the presentation of mitigating evidence at a separate penalty hearing. Lockett v. Ohio, 438 U.S. 586, 632-636 (1978) (Rehnquist, J., dissenting). Nevada's mandatory death penalty, as it is applied to Respondent Shuman, provides sufficient individualized consideration of his character, record and the circumstances of his offense. Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Under the circumstances of this case,

where all relevant mitigating evidence has already been presented at trial, and where Shuman's character and record have been given individualized consideration in prior criminal proceedings, as well as at the 1975 trial, the mandatory death penalty, as it is applied to Shuman, is constitutional. Tennessee v. Garner, ___ U.S. ___, 105 S.Ct. 1694, 1701 (1985).

ARGUMENT

I. THE AMICI CURIAE DO NOT FOCUS ON THE SPECIFIC LAW AND FACTS OF SHUMAN'S CASE

Donald Thigpen and Johnny Harris were both convicted of murder, and sentenced to death, under an Alabama law which is not as narrowly drawn as Nevada's mandatory death penalty statute. Harris v. State, 352 S.2d 479 (Ala. 1977); Thigpen v. Smith, 603 F.Supp. 1517 (S.D. Ala. 1985) vacated on other grounds 792 F.2d 1516 (11th Cir. 1986). It was provided in Ala.

Code , Title 14, § 319 as follows:

Any convict sentenced to imprisonment for life, who commits murder in the first degree, while such sentence remains in force against him, shall, on conviction suffer death.

This provision had been a part of Alabama law since 1886. Harris, supra, 352 S.2d 479-480.

Unlike Nevada's law, this mandatory penalty is not limited to first degree murders which are committed by prisoners already serving sentences of life without the possibility of parole. The Alabama statute is not as narrowly drawn as Nevada's and therefore, that statute, and its particular application to Harris and Thigpen, cannot fairly be compared to the case under consideration.

Amici curiae, like Respondent Shuman, emphasize the facts of other cases, and other possible applications of mandatory death sentences. This tactic reveals

their recognition that in Shuman's case, there simply is no additional mitigating evidence to be presented, and the recognition that in Shuman's case the Nevada statute provides the necessary individualized consideration of his character, record, as well as the circumstances of the offense. Woodson v. North Carolina, 428 U.S. 280 (1976).

The amicus brief of the Center for Constitutional Rights, the American Civil Liberties Union (ACLU), and the ACLU of Nevada Foundation argues that the Nevada law in question would invite jury nullification. ACLU Brief, pp. 43-50. This assertion necessarily implies the unsupported assumption that a jury hearing a case such as Shuman's would ignore its solemn oath to follow the law as instructed. This argument further requires the assumption that such a jury would fail, impartially to determine the

facts in accordance with the instructed law in this unique case. Amici is unable to cite any relevant statistical or other authority to support this claim.

In this case, there is no dispute regarding the fairness of Shuman's murder trial in April, 1975. Respondent has raised no issues to the court of appeals, or this Court, regarding the fairness of his jury trial. Shuman testified at that trial, and thus had the opportunity to present mitigating evidence on his behalf. At no time, in any of the appellate or post conviction proceedings herein, at both the state and federal level, has Shuman contended that he actually has relevant mitigating evidence, in addition to his trial testimony, which should be considered before the imposition of the death penalty. Amici cannot reasonably argue that where the fairness of Shuman's trial is apparent, that the jury rendered

its decision arbitrarily in light of the grave consequences of the conviction.

Amici argues that Nevada's law would fail to differentiate among the myriad spectrum of life term inmates who kill in prison. In fact, the group of inmates to whom this penalty could have been applied (prisoners serving life without possibility of parole July 1, 1973-June 30, 1977) was largely homogenous.¹ Additionally, this argument completely ignores the extremely lengthy and involved trial, appellate and post-conviction procedures which necessarily examine and reexamine the character, records, and circumstances of the offense of the murderer before he or she would

¹ A recent study conducted by the Office of Classification and Planning of the Nevada Department of Prisons revealed that of 66 offenders in this category, 63 were murderers. The remaining 3 were convicted of kidnapping/robbery, rape with the use of a deadly weapon, and sales of heroin respectively.

receive the mandatory death penalty in Nevada.

Finally, the repeal of Nevada's statute in 1977 was simply a reaction to the decisions of this Court which struck down other forms of mandatory death penalties. See, e.g. Smith v. State, 93 Nev. 82, 560 P.2d 158 (1977) (Nevada's mandatory death penalty for multiple murder held unconstitutional). The legislative history regarding the repeal of the statute under consideration herein gives no indication that the Nevada legislators were aware that this specific type of mandatory death penalty had been excepted from the Court's decisions. See: Minutes, Nevada Senate Judiciary Committee, February 25, 1977, pp. 194-197; March 14, 1977, pp. 371-378; Memorandum on S.B. 220, pp. 322-340. This repeal does not signal public rejection of the penalty applicable in this case.

II. THE NEVADA MANDATORY DEATH SENTENCE, AS APPLIED TO SHUMAN, AN INMATE SERVING A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE FOR FIRST DEGREE MURDER, WHO COMMITTED ANOTHER FIRST DEGREE MURDER, IS CONSTITUTIONAL

Neither the Eighth nor Fourteenth Amendments to the United States Constitution prescribe the bifurcated guided-discretion method for imposition of a death sentence as the only constitutional means for the infliction of such a penalty. This Court has recognized that there is no single procedure mandated by the Constitution in capital cases. For example, a judge may properly over-ride a jury's recommendation against the death penalty. Proffitt v Florida, 428 U.S. 242 (1976). Nor, must a state death penalty statute specifically provide for the introduction of mitigating circumstances. Jurek v. State of Texas, 428 U.S. 226 (1976). Furthermore, proportionality review is not required by the

Constitution. Pulley v. Harris, ___ U.S. ___, 104 S.Ct. 871 (1984). Thus, it is clear that the democratically-elected state legislatures have the authority to decide both when death shall be the prescribed punishment, and how that punishment shall be imposed. Cabana v. Bullock, ___ U.S. ___, 106 S.Ct. 689 (1986). This legislative discretion is limited by the constraints of the Constitution, which require that the criminal proceeding insure that fundamental fairness prevails, and that specifically enumerated rights be scrupulously respected. McGautha v. California, 402 U.S. 183, 200 (1971) (opinion of Harlan, J.). In capital cases, the procedures to be followed must be designed to avoid the arbitrary or capricious imposition of the death penalty. Furman v. Georgia, 408 U.S. 238 (1972). In general, the character and record of the offender, as well as the

circumstances of the particular offense, must be given particularized consideration prior to the imposition of a death sentence. Woodson v. North Carolina, 428 U.S. 280, 288-304 (1976) (plurality opinion of Justices Stewart, Powell and Stevens). However, in considering this Eighth Amendment requirement of individualized consideration, it must be remembered that the Constitution does not specifically require that a capital offender be allowed to introduce evidence in mitigation at a separate penalty hearing prior to the imposition of a death sentence. Lockett v. Ohio, 438 U.S. 586, 632-636 (1978) (Rehnquist, J., dissenting).

The constitutional requirements noted above have been met by the Nevada law in the course of the criminal procedures followed in Shuman's case. Under the Nevada law in question, it is a foundational requirement that the offender

already has been determined, through the judicial process, to be a person whose character, record, and whose prior offense are such that he should never be released from prison. This prerequisite necessarily requires individualized examination through the judicial process of his record, character, as well as the circumstances of his prior offense. In Shuman's case, a jury made this initial examination, and rendered its decision in 1958 that Shuman should be sentenced to life in prison without the possibility of parole for the first degree murder of Vernon Stallard. Shuman v. Wolff, 791 F.2d 788, 789 (9th Cir. 1986).

Secondly, under Nevada's law, the character of the accused, as well as the circumstances of his most current offense, must necessarily be examined at the trial for the murder committed while the offender was serving his previous

sentence. In Shuman's case, at the trial held in April, 1975, each of these factors was considered by the jury, and Shuman himself testified presenting evidence in mitigation. Shuman v. State, 94 Nev. 265, 587 P.2d 1183 (1978). Evidence offered in mitigation by Shuman was rejected by the jury, and he was convicted of first degree murder. At no time in a subsequent appellate or habeas proceeding has Shuman offered actual mitigating evidence, in addition to his trial testimony, which he should be allowed to introduce prior to imposition of the death sentence. Under these circumstances, where all relevant mitigating evidence has already been presented at trial, and where Shuman's character and record have been given individual consideration at prior criminal proceedings, as well as at the subject trial, the mandatory death penalty is proper as applied to Shuman. Tennessee

v. Garner, ___ U.S. ___, 105 S.Ct. 1694,
1701 (1985).

As the Nevada Supreme Court noted in its decision affirming Shuman's conviction, Shuman's case does present the unique problem which justifies a mandatory death penalty. The Nevada Supreme Court stated:

Unlike all other situations, in which the question presented to the jury is the degree or nature of punishment that should be imposed, the question presented in this instance, if a separate hearing were required, would be whether any effective punishment should be imposed at all upon a prisoner already serving a life sentence without possibility of parole. What "mitigating circumstances" could be offered that would justify the result that an individual convicted of murder should suffer no practical legal consequences for that deliberate act? It is this circumstance that makes the case "unique".

We note that this would also be the result if, as Shuman urges, we declare the statute under which he was sentenced unconstitutional. We do not see "fundamental respect for

humanity", Woodson v. North Carolina, 428 U.S. at 304, reflected in the conclusion that the murder of Bejarno should be without effective legal consequences for its perpetrator.

Shuman v. State, 94 Nev. 271, 578 P.2d 1186-1187.

CONCLUSION

It is respectfully requested that the opinions of the appellate court and the district court, insofar as they vacate Shuman's death sentence, be reversed.

Respectfully submitted.

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**POST -
ARGUMENT
BRIEF**

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Supreme Court, U.S.

U. S. D. C.

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**ON WRIT OF CERTIORARI TO THE UNITED
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**MOTION FOR LEAVE TO FILE POST-ARGUMENT
BRIEF AND TO SUPPLEMENT THE RECORD ON
BEHALF OF PETITIONERS AND POST-
ARGUMENT BRIEF OF PETITIONERS**

BRIAN McKAY

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No. 86-246

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE SUMNER, Director, Nevada
Department of Prisons, BRIAN McKAY,
Attorney General of Nevada,

Petitioners,

v.

RAYMOND WALLACE SHUMAN,

Respondent.

MOTION FOR LEAVE TO FILE POST-ARGUMENT
BRIEF AND TO SUPPLEMENT THE RECORD
ON BEHALF OF PETITIONERS

Petitioners, Brian McKay, Attorney
General of the State of Nevada, and
George Sumner, Director of the Nevada
Department of Prisons, respectfully
request the Court to grant them leave to
file a post-argument brief and to
supplement the record. This request is
made pursuant to Supreme Court Rule 35.6

for the following reasons:

1. During oral argument counsel for respondent raised for the first time issues regarding the release of Shuman's co-defendant and commutation of sentences of life without the possibility of parole in the State of Nevada. Tr. of Oral Argument 31-32, 48. Counsel for respondent also made reference to evidentiary matters on these issues which are not contained in the record before the Court. Tr. of Oral Argument 32, 48.

2. During oral argument, the Court requested counsel for respondent to submit specific information regarding these issues to the Court. Tr. of Oral Argument 34, 52.

3. During oral argument counsel for respondent made reference to prison administrative practices which are not found in the record. Tr. of Oral Argument 42, 43.

4. During oral argument counsel for respondent conceded to the Court that Respondent Shuman could now properly be subjected to Nevada's bifurcated death penalty procedure, on remand. Tr. of Oral Argument 45. Counsel for petitioners has been informed by counsel for Respondent Shuman that they now renege on that concession and will so advise the Court. Therefore, the Attorney General requests permission to address this issue concerning the possible retroactive application of Nevada's current bifurcated death penalty procedure to Respondent Shuman.

Counsel for petitioners requests the Court's permission to supplement the record by separate submission of the following documents which are relative to the above-referenced issues raised for the first time during oral argument:

a. Partial Transcript of

Nevada Board of Pardons
Hearings held November 26,
1974, and May 19, 1975,
Proceedings on Application of
Melvin Rowland.

b. Summary of Nevada Board of
Pardons action on all
applications of Prisoners
Serving Life Without the
Possibility of Parole, May,
1982 - November, 1986.

c. List of Prisoners Serving
Sentences of Life Without the
Possibility of Parole as of
December 31, 1982.

d. Nevada Department of
Prisons Code of Penal
Discipline, August 1, 1986.

These documents are submitted to the

. . .
. . .
. . .

Court under separate cover simultaneously
herewith.

Respectfully submitted this _____
day of May, 1987.

BRIAN McKAY
Attorney General

By: _____
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No. 86-246

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE SUMNER, Director, Nevada
Department of Prisons, BRIAN McKAY,
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Petitioners,

v.

RAYMOND WALLACE SHUMAN,

Respondent.

POST-ARGUMENT BRIEF OF PETITIONERS

SUMMARY OF ARGUMENT

This is the unique case foreseen by the Court in Woodson v. North Carolina, 428 U.S. 280 (1976) and Roberts v. Louisiana, 428 U.S. 325 (1976) where a very narrowly drawn mandatory death penalty may properly be imposed. The possibility of clemency does not render the imposition of Shuman's mandatory

death penalty arbitrary or capricious. Gregg v. Georgia, 428 U.S. 153, 200 (1976); Jurek v. Texas, 428 U.S. 226, 275 (1976). Clemency is infrequently granted in Nevada to inmates serving sentences of life without the possibility of parole. Summary of Nevada Board of Pardons Action, Appendix A. The grant of clemency to Melvin Rowland (Shuman's 1957 crime partner) is irrelevant to the issue before the Court in this case. Prison administrative sanctions are not "alternative punishment" for the crime of premeditated murder.

The retroactive application to Shuman of Nevada's bifurcated death penalty procedure raises serious ex post facto and equal protection issues. Shuman will effectively receive no punishment unless the death penalty is imposed. Under Nevada's law, Shuman's character and record and the

circumstances of his offense have been duly considered to avoid the arbitrary imposition of the death penalty prohibited by the United States Constitution.

ARGUMENT

I. THE POSSIBILITY OF CLEMENCY DOES NOT AFFECT THE VALIDITY OF SHUMAN'S DEATH PENALTY.

Shuman is the unique case foreseen by the Court in Woodson and Roberts, supra, where a mandatory death penalty may constitutionally be applied to a narrowly defined group of the worst criminal offenders: those serving life without the possibility of parole who murder in prison. Respondent's arguments concerning the effect of clemency on this death penalty are not only incorrect, but serve to lead the Court away from the real issue which simply is whether Shuman's death sentence for the premeditated murder of a fellow prisoner

has been imposed in a non-arbitrary and non-discriminatory manner. Furman v. Georgia, 408 U.S. 238 (1972).

The power to pardon is recognized as an act of grace and humanity. Ex parte Wells, 18 How (U.S.) 307, 15 L.Ed. 421 (1856); United States v. Wilson, 7 Pet (U.S.) 150, 8 L.Ed. 640 (1933). The power to commute a sentence to a lesser one serves the same purposes, and differs from a pardon only in that it may be imposed without the consent of the convict. Biddle v. Perovich, 274 U.S. 480 (1927); Anderson v. State, 90 Nev. 385, 528 P.2d 1023 (1974).

This Court has recognized the distinct and separate nature of the pardons power in capital cases and has discussed its impact in such cases. As this Court stated in Gregg v. Georgia, 428 U.S. 153, 200 (1976), "Nothing in any of our cases suggests that the decision

to afford an individual defendant mercy violates the Constitution." Compare McClesky v. Kemp, 55 U.S.L.W. 4537, 4546 (U.S. April 22, 1987) (possibility of leniency does not affect validity of death penalty procedure).

Similarly, the commutation power, as it exists in Nevada, does not affect the validity of Shuman's death sentence. Commutations of sentences of life without the possibility of parole are infrequently granted.

In the last five years the Board of Pardons has granted the petitions of only seven such prisoners. See Summary of Nevada Board of Pardons Action on Applications of Prisoners Serving Life Without the Possibility of Parole 1982-1986, set forth in Appendix A. In each case the sentence was commuted to life with the possibility of parole. Twenty-two petitions were denied in that

period. Id. The number of petitions granted is only a small fraction of the group of prisoners serving sentences of life without the possibility of parole. As of December 31, 1982, the records of the Nevada Department of Prisons reveal 102 prisoners serving sentences of life without the possibility of parole. See Survey by Office of Classification and Planning of Nevada Department of Prisons, set forth in Appendix B. Ninety-eight of those sentences were for murder. Of the remaining four, two were sentenced for first degree kidnapping, one for sexual assault and one as a habitual criminal Id.

A 1982 state constitutional amendment prospectively prohibits commutation of sentences of life without the possibility of parole. See 1981 Nev. Stats. at 2097. The pardons board procedures are found in Nev. Rev. Stat.

§§ 213.005 to 213.100 and are set forth in Appendix C, hereto. The Board of Pardons continues to hear petitions from prisoners serving life without the possibility of parole whose crimes and convictions occurred before the 1982 amendment, granting only one or two petitions a year. See Appendix A.

While it is true that Shuman's co-defendant in the 1957 murder, Melvin Rowland, obtained a commutation of his sentence of life without the possibility of parole in 1975, this fact has no logical bearing upon the issue before the Court. Transcript of Hearing before Board of Pardons May 19, 1975, Application of Melvin Rowland, see Supplement to Record. Rowland's commutation was the result of almost seventeen years of time-served with good behavior and was granted two years after Shuman's brutal prison murder of Ruben

Bejarano. Id. The commutation of Rowland's sentence is simply irrelevant.

This collateral consequence of Shuman's second murder (the speculative loss of his ability to obtain a commutation of his first murder sentence) is not "punishment" for the crime of murder. Nor does the commutation practice in Nevada affect the validity of Shuman's death sentence. To so hold would be contrary to this Court's statements in Jurek and Gregg, and would open the door to numerous arguments regarding the effect of such a minor and speculative collateral consequence in death penalty and other cases.

II. PRISON ADMINISTRATIVE
SANCTIONS FOR SHUMAN'S PRISON
MURDER ARE NOT PUNISHMENT FOR
THE CRIME OF PREMEDITATED
MURDER.

At oral argument, it was suggested that the prison administrative sanctions, such as segregation, would be sufficient

punishment for Shuman's murder of Ruben Bejarano. Tr. of Oral Argument 42-43. See Nevada Department of Prisons, Code of Penal Discipline, August 1, 1986, Supplement to the Record. This suggestion is an insult to our criminal justice system and utterly trivializes the gravity of Shuman's act.

Placing an inmate in a single cell in segregation may, in fact, be considered a reward, since it affords him some measure of privacy which is generally unavailable within the prison. This is not punishment for the crime of murder.

This Court has recognized that prison disciplinary proceedings are not part of the criminal prosecution process. Baxter v. Palmigiano, 425 U.S. 308, 317 (1976). Similarly, other courts which have considered whether prison administrative sanctions may constitute

double jeopardy or double punishment for criminal acts have rejected this proposition.

Kerns v. Parratt, 672 F.2d 690, 691-692 (8th Cir. 1982) (prison administrative proceedings for disciplinary infractions do not bar subsequent criminal prosecution); Benfield v. Bounds, 540 F.2d 670, 676 (4th Cir. 1976) (prisoner's double jeopardy claim is without merit); United States v. Salazar, 505 F.2d 72, 75 (8th Cir. 1974) (double jeopardy claims of prisoners based on prison administrative action have been repeatedly rejected).

A prisoner becomes subject to the prison administrative and disciplinary sanctions upon his initial conviction. Pell v. Procunier, 417 U.S. 817, 822 (1974) (incarceration necessarily causes withdrawal of many privileges and rights); Price v. Johnston, 334 U.S. 226, 285 (1948) (a prisoner's loss or

restriction of rights and privileges is justified by the needs of the penal system); Gittlemacker v. Prose, 428 F.2d 1, 3 (3rd Cir. 1970) ("the denial of his right to drink fully from the cup of freedom is the very hypostasis of confinement"). These rules are intended to assist the prison administrators in maintaining order and discipline within the prison. They are not intended to be a substitute for criminal prosecution and punishment where the laws of a state have been violated and they should not be so construed.

The suggestion that prison administrative sanctions satisfy in some degree the legitimate criminal justice goals of retribution, deterrence and incapacitation blurs the distinctions between the separate functions and goals of criminal prosecution and prison administration. Such a holding would

invite inter alia questions of double jeopardy and could seriously hamper prison administration, as well as orderly criminal prosecution of the numerous criminal acts committed by prisoners.

III. RETROACTIVE APPLICATION OF NEVADA'S BIFURCATED DEATH PENALTY PROCEDURE RAISES SERIOUS EX POST FACTO AND EQUAL PROTECTION QUESTIONS.

The legality of a remand for resentencing under Nevada's current bifurcated death penalty procedure was raised during oral argument. Tr. of Oral Argument 7, 45. See Nev. Rev. Stat. §§ 175.552 - 175.562 (1977), set forth in Appendix D. Counsel for petitioners stated that Shuman possibly could be resentenced in this fashion, but pointed out to the Court the 1973 provision of the Nevada mandatory death penalty law which provided for automatic resentencing to life without the possibility of parole, should the death penalty be

invalidated. Tr. of Oral Argument 7, 23. Counsel for respondent conceded to the Court that resentencing under the bifurcated procedure would be legal. Tr. of Oral Argument 45. This concession may have been improvidently given.

The 1973 law under which Shuman was sentenced provided for automatic resentencing should the death penalty be invalidated. Specifically, it was provided:

If the death penalty, as provided in section 5 of this act, is held to be unconstitutional by the court of last resort, a person who has been convicted of capital murder shall be punished by life imprisonment without the possibility of parole.

1973 Nev. Stats. Ch. 798, § 14 at 1807 (emphasis added).

In Dobbert v. Florida, 432 U.S. 282, at 290 (1977), this Court discussed the prohibition against ex post facto laws in

Article 1, Section 10, Clause 1 of the United States Constitution, saying:

It is settled, by decisions of the Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

Cf. Weaver v. Graham, 450 U.S. 24, 34 (1981) (whether criminal statute ameliorates or worsens condition imposed by its predecessor is a federal question).

The factual and legal circumstances in this case compare strongly to the situation in Dobbert. Shuman, like Dobbert, at the time he was charged and convicted, was on notice that death was the maximum penalty provided by law for his crime. Dobbert v. Florida, 432 U.S.

at 298. Under Nevada's new procedure, Shuman would face the death penalty once more. Furthermore, the new Nevada procedure can be considered ameliorative in that Shuman would now have the opportunity to present mitigating evidence on his behalf and could possibly receive a lesser sentence. Id. at 295. But for the specific resentencing provision of the 1973 law, there would be no doubt regarding the propriety of resentencing under Nevada's new bifurcated procedure.

On the other hand, Shuman may have had a reasonable expectation that in the event his sentence was ultimately held unconstitutional that he would receive a sentence of life without the possibility of parole. Under these circumstances requiring Shuman to face the death penalty again may be considered detrimental and an improper increase in

punishment. See United States v. Romero, 596 F.Supp. 446, 448 (1984) (a law which eliminates a sentencing option available at the date of the crime may be ex post facto); Lindsey v. Washington, 301 U.S. 397, 401-402 (1973) (statute which works to material disadvantage of offender may be ex post facto).

An additional argument militates against application of the new procedure to Shuman. Research has revealed another prisoner originally sentenced under another section of Nevada's mandatory death penalty law who has received the benefit of the automatic resentence provision. Edward Leroy Smith received a mandatory death penalty for the killing of more than one person as the result of a single plan, scheme, or design. Smith v. State, 93 Nev. 82, 83, 560 P.2d 158, 159 (1977). The Nevada Supreme Court vacated Smith's mandatory death penalty

and resentenced him, nunc pro tunc, to life without the possibility of parole. Id.

Under these circumstances, where another mandatory death sentence has been vacated and the defendant has received automatic resentencing to life without the possibility of parole, the denial of such resentencing to Shuman would possibly violate his right to equal protection of the laws, under the Fourteenth Amendment to the United States Constitution. Cf. In re Moreno, 130 Cal. Rptr. 78, 80-81, 58 Cal. App. 3d. 741 (Cal. App. 1976) (equal protection is not denied where amendatory statute is not applied to convictions occurring before the effective date of amendments). Unlike Dobbert, Shuman appears similarly situated to another Nevada prisoner whose mandatory death penalty was converted to a life sentence. Dobbert v. Florida, 432

U.S. at 302. Furthermore, the Nevada Supreme Court has ruled that a defendant must generally be sentenced under the law which was in effect at the time of the offense. Sparkman v. State, 95 Nev. 76, 82, 590 P.2d 151, 155, 156 (1979); Tellis v. State, 84 Nev. 587, 591-592, 445 P.2d 938, 941 (1968).

Thus, in this very unique case, Shuman effectively will receive no punishment should his mandatory death sentence be vacated, even though there is absolutely no question that he committed the premeditated and brutal murder of Ruben Bejarano and even though Shuman in fact has no mitigating evidence to present. The district court ordered Shuman to make an offer of proof regarding, among other things, proposed mitigating evidence. See Order of Reed, J., dated September 28, 1982. No offer of proof was tendered by Shuman on this

issue.

To allow Shuman to go unpunished in these circumstances would be unjust. Such a result is not compelled by this Court's decision in Furman and its progeny. The touchstone of constitutionality is satisfied in this case by the imposition upon Shuman of this unique and narrowly drawn mandatory death sentence. His record, character, and the circumstances of his offense have been duly considered in both the predicate criminal proceedings and at his trial for his latest murder. The death penalty is the only punishment which will serve the ends of justice.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the order of the Court of Appeals, insofar as it affirmed the District Court order vacating
...

Shuman's death sentence should be
reversed.

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APPENDICES

APPENDIX A

SUMMARY OF NEVADA BOARD OF PARDONS
ACTION ON APPLICATIONS OF PRISONERS
SERVING LIFE WITHOUT THE POSSIBILITY
OF PAROLE, 1982 - 1986.

NYKKI KINSLEY
Executive Secretary

BOARD OF PARDONS COMMISSIONERS

May 1, 1987

MEETING DATE	INMATE	ACTION TAKEN
11/20/86	WALTER ROGERS	GRANTED
	ROBERT JOHNSTONE	DENIED
	STEVEN ABRAM	DENIED
	JIMMY DALE OWENS	DENIED
5/6/86	GARY KRUEGER	DENIED
	JAMES H. LEWIS	GRANTED
	DAVID MAESTAS	GRANTED
10/7/85	WALTER ROGERS	DENIED
5/9/85	BENJAMIN JONES	GRANTED
	LEON ANDERSON	DENIED
11/8/84	MAURICE BROWN	DENIED
	LYNDEN KELSO	DENIED
	ROY WARREN OSBORN	DENIED
	EDWARD SMITH	DENIED

MEETING DATE	INMATE	ACTION TAKEN
5/8/84	WALTER WELLMAN	DENIED
	LESTER MORFORD	DENIED
	FRED PENSEL	GRANTED
10/18/83	LYNDEN KELSO	GRANTED
	GEORGE SINGLETON	GRANTED
	JACK SUMMERS	DENIED
4/19/83	TERRY CONGER	DENIED
	MICHAEL ANSELMO	DENIED
	TIMOTHY GRIMALDI	DENIED
	GEORGE SINGLETON	DENIED
11/23/82	ROY WARREN OSBORN	DENIED
	LYNDEN KELSO	DENIED
5/5/82	BENJAMIN JONES	DENIED
	GEORGE SINGLETON	DENIED
	JACK SUMMERS	DENIED

APPENDIX B

NEVADA DEPARTMENT OF PRISONS OFFICE OF CLASSIFICATION AND PLANNING

NEVADA INMATES SERVING LIFE WITHOUT POSSIBILITY OF PAROLE AS OF DECEMBER 31, 1982

INMATE NO.	INMATE NAME	OFFENSE
8630	BEAN, THOMAS	MURDER
8631	MORFORD, LESTER	MURDER
9148	OSBORN, ROY	MURDER
9165	ROGERS, WALTER	MURDER
9675	WALKER, JOSEPH	MURDER
10040	CONGER, TERRY	MURDER
10256	SUMMER, JACK	MURDER
10386	ANDERSON, LEON	MURDER
10571	SINGLETON, G.	MURDER
10769	TEET, JAMES	MURDER
10999	ANSELMO, M.	MURDER
11013	GRIMALDI, T.	MURDER
11108	LAYTON, JOHNNY	MURDER
11287	BISHOP, JERRY	MURDER
11292	BAYMAN, EDDIE	MURDER
11293	JONES, BENJAMIN	MURDER
11351	OWENS, JIMMY	MURDER
11360	BISHOP, BARNELL	MURDER
11456	PENSEL, FRED	MURDER
11780	JOHNSTONE, R.	MURDER
11871	TAYLOR, JAMES	MURDER
11872	THERIAULT, C.	MURDER
11995	SURIANELLO, A.	MURDER
12006	MAGINNIS, R.	MURDER
12007	MELLO, RICHARD	MURDER
12012	BURCH, RICHARD	MURDER
12015	MAESTAS, DAVID	MURDER
12056	CHANDLER, DAVID	MURDER
12192	BRIMAGE, DAN	MURDER
12220	WELLMAN, WALTER	MURDER
12273	KRUEGER, GARY	MURDER
12321	SMITH, EDWARD	MURDER

APPENDIX B
(Continued)

INMATE NO.	INMATE NAME	OFFENSE
12327	BOND, JESSE	MURDER
12353	KIMMEL NATHAN	MURDER
12370	NEUSCHAFER, JIM	MURDER
12394	WILLS, EDWARD	MURDER
12483	DEFONO, GERALD	MURDER
12489	GATES, ANDREW	MURDER
12492	HORTON, WAYNE	MURDER
12525	MELLER, KENNETH	MURDER
12686	FLETCHER, SCOTT	MURDER
12751	DAUGHTERY, H.	MURDER
12847	BARKER, ANTHONY	MURDER
12896	CUNNINGHAM, JON	MURDER
12961	KELSO, LYNDEN	MURDER
12993	BRIANO, JOHN	MURDER
13023	CRANFORD, B.	MURDER
13038	ABRAM, STEVEN	MURDER
13060	AZBILL, S.	MURDER
13080	LEWIS, JAMES	MURDER
13229	GARRETT, JAY	MURDER
13367	CUELLAR, MARK	MURDER
13458	EDWARDS, DAVID	MURDER
13491	ADAMS, CHARLES	MURDER
13498	FARMER, BILLY	MURDER
13552	HANLEY, GRAMBY	MURDER
13678	WOOD, RAYE	MURDER
13718	BACCARI, L.	MURDER
13804	THEOBALD, DEVON	KID I
13907	WOOD, TONY	MURDER
13986	KING, LANDERS	MURDER
14213	STANDEN, WARREN	MURDER
14404	BARNES, DAVID	MURDER
14457	GIBBONS, W.	MURDER
14535	HERN, BRIAN	MURDER
14631	COLLURA, GARY	MURDER
14678	GRAINER, HOWARD	MURDER
14679	HEIMRICH, FRED	MURDER
14680	YEAGER, RUSSELL	MURDER
14686	DOANE, JOHN	SEX ASSLT

APPENDIX B
(Continued)

INMATE NO.	INMATE NAME	OFFENSE
14801	LANI, DAVID	MURDER
14802	STITES, FRED	MURDER
14937	GRESS, RONALD	MURDER
15094	BOOKER, L.	MURDER
15121	AGUILAR, JOSE	MURDER
15180	DEAN, DENNIS	MURDER
15192	TOMARCHIO, P.	MURDER
15269	KINNEY, JOEL	MURDER
15342	MC CABE, DENNIS	MURDER
15377	TURNER, ROBERT	MURDER
15398	BLAKE, SAMUEL	MURDER
15423	KAPLAN, MOREY	MURDER
15574	BEAN, DAVID	MURDER
15578	DYER, PETER	MURDER
15708	WOODS, CATHY	MURDER
15802	KORNEGAY, JOHN	MURDER
15830	SEE, EDWARD	MURDER
15889	SMITH, THOMAS	KID I
15969	PATTON, JAMES	MURDER
15974	KAUFMAN, LLOYD	MURDER
16079	EVERETT, G.	MURDER
16092	HANSEN, LARRY	MURDER
16102	TIGER, VERNON	MURDER
16148	AXTELL, CHARLES	MURDER
16235	WRIGHT, JOHN	MURDER
16432	THOMAS, BOBBY	MURDER
16959	CLINE, PHILLIP	MURDER
17157	STONECIPHER, S.	MURDER
17251	KOZA, JOSEPH	MURDER
17426	BONNETTE, TERRY	MURDER
17741	COOPER, WAYNE	HAB CRIM
17796	FICKLIN, BENNIE	MURDER

APPENDIX C

NEVADA REVISED STATUTES

Sections 213.005 - 213.100:

Section 213.005 Definitions: As used in NRS 213.010 to 213.100, inclusive, unless the context otherwise requires:

1. "Board" means the state board of pardons commissioners.

2. "Victim" includes:

(a) A person against whom a crime has been committed;

(b) A person who has been injured or killed as a direct result of the commission of a crime; or

(c) The surviving spouse, parents or children of such a person.

(Added to NRS by 1983,1330)

Section 213.010 State board of pardons commissioners: Members; meetings; notice of meetings to victim.

1. The state board of pardons commissioners consists of the governor,

the justices of the supreme court and the attorney general.

2. Meetings of the board for the purpose of considering applications for clemency may be held semiannually or oftener, on such dates as may be fixed by the board.

3. The board shall give written notice at least 15 days before a meeting to each victim of the crimes committed by each person whose application for clemency will be considered at the meeting, if the victim so requests in writing and provides his current address. If a current address is not provided, the board may not be held responsible if the notice is not received by the victim. The victim may submit a written response to the board at any time before the meeting.

[1:149:1933; 1931 NCL § 11569]--(NRS A 1957, 738; 1973, 803; 1979, 657; 1983,

1330, 1438, 1658)

Section 213.015 Salaries of certain board members who are justices of supreme court.

1. Until the 1st Monday in January 1987:

(a) Any member of the board whose annual salary as a justice of the supreme court is \$61,500 shall receive no salary as a member of the board.

(b) Any member of the board whose annual salary as a justice of the supreme court is \$47,250 is entitled to receive as a member of the board an annual salary of \$14,250.

2. From and after the 1st Monday in January 1987:

(a) Any member of the board whose annual salary as a justice of the supreme court is set by subsection 1 of NRS 2.050 shall receive no salary as a member of the board.

(b) Any member of the board whose annual salary as a justice of the supreme court is set by subsection 2 or 3 of NRS 2.050 is entitled to receive as a member of the board an annual salary in an amount which when added to his salary as a justice equals the salary set by subsection 1 of NRS 2.050.

3. The salaries provided for in this section must be paid out of money provided by direct legislative appropriation from the state general fund.

(Added to NRS by 1963, 1314; A 1965, 1154; 1969, 790; 1971, 2205; 1977, 1014; 1981, 1372; 1985, 1608)

Section 213.017 Secretary of board. The executive secretary of the state board of parole commissioners shall be the secretary of the board and shall perform such duties in connection therewith as the board may require without additional

compensation.

(Added to NRS by 1973, 804)

Section 213.020 Notice of application for remission, commutation or pardon: Number of copies; contents; service.

1. Any person intending to apply to have a fine or forfeiture remitted, or a punishment commuted, or a pardon granted, or someone in his behalf, shall make out a notice and four copies in writing of the application, specifying therein:

(a) The court in which the judgment was rendered;

(b) The amount of the fine or forfeiture, or kind or character of punishment;

(c) The name of the person in whose favor the application is to be made;

(d) The particular grounds upon which the application will be based; and

(e) The time when it will be

presented.

2. Two of the copies must be served upon the district attorney and one upon the district judge of the county wherein the conviction was had. The fourth copy must be served upon the director of the department of prisons and the original must be filed with the clerk of the board. In cases of fines and forfeitures a similar notice must also be served on the chairman of the board of county commissioners of the county wherein the conviction was had.

3. The notice must be served, as provided in this section, at least 30 days before the presentation of the application, unless a member of the board, for good cause, prescribes a shorter time.

[4:149:1933; 1931 NCL § 11572] +
[Part 5:149:1933; 1931 NCL § 11573]--(NRS
A 1977, 869; 1983, 1331)

Section 213.030 When notice of application not required. No notice shall be required of an application for:

1. A restoration to citizenship to take effect at the expiration of a term of imprisonment; or

2. The commutation of the death penalty.

[9:149:1933; 1931 NCL § 11577]

Section 213.040 District attorneys to furnish board with statement upon receipt of notice of application for remission, commutation or pardon; notice of application to victim. All district attorneys receiving notice of an application for a pardon, or commutation of punishment, or remission of fine or forfeiture, shall transmit forthwith to:

1. The board a statement in writing of facts surrounding the commission of the offense for which the applicant is incarcerated or subject to

penalty and any information affecting the merits of the application.

2. Each victim of the person applying for clemency a copy of the notice of the application, if the victim so requests in writing and provides his current address. If a current address is not provided, the district attorney may not be held responsible if a copy of the notice is not received by the victim.

[6:149:1933; 1931 NCL § 11574]--(NRS A 1957, 333; 1983, 1331)

Section 213.050 Board members may administer oaths; certification of affidavits and depositions by judges, county clerks and notaries public.

1. Any member of the board shall have authority to administer an oath or affirmation to any person offering to testify upon the hearing of an application for a pardon, or the commutation of a punishment, or the

remission of a fine or forfeiture.

2. Any district judge, county clerk or notary public may take and certify affidavits and depositions to be used upon such applications, either for or against the same.

[7:149:1933; 1931 NCL § 11575]--(NRS A 1957, 738)

Section 213.055 Handicapped person entitled to services of interpreter at hearing. An applicant or a witness at a hearing upon an application for clemency who is a handicapped person as defined in NRS 50.050 is entitled to the services of an interpreter at public expense, subject to the provisions of NRS 50.052 and 50.053. The interpreter must be appointed by the governor or a member of the board designated by him.

(Added to NRS by 1979, 657)

Section 213.060 Procedure when judgment of fine or forfeiture is remitted.

Whenever acting as the board, the governor, justices of the supreme court and the attorney general, or the major part of them, the governor being one, shall remit any judgment of fine or forfeiture, a certificate reciting the fine or forfeiture remitted, duly signed and attested with the great seal of the state, shall be filed in the clerk's office of the court wherein the judgment of fine or forfeiture was entered, and the clerk shall make an entry in the judgment docket or other proper place, showing that the fine or forfeiture is remitted, which filing and entry shall be evidence of the satisfaction thereof.

[2:149:1933; 1931 NCL § 11570]

Section 213.070 Fines and forfeitures do not include discharge from liability on bail bond. The fines and forfeitures mentioned in this chapter shall not be so construed as to include the remittance or

discharge from liability on any bail bond.

[10:149:1933; 1931 NCL § 11578]

Section 213.080 Procedures when death penalty is commuted.

1. Whenever any punishment involving the death penalty is commuted, a statement in writing shall be made out and signed reciting:

(a) The name of the person whose punishment is commuted.

(b) The time and place where convicted.

(c) The amount, kind and character of punishment substituted instead of the death penalty.

(d) The place where the substituted punishment is to be served out or suffered.

2. The statement shall be directed to the proper officer or authority charged by law with the safekeeping and

execution of the punishment. The statement, attested with the great seal of this state, shall be sufficient authority for such officer or authority to receive and retain the person named in the statement as therein directed, and the officer or authority named in the statement must receive the person whose punishment has been commuted, and retain him as directed.

[3:149:1933; 1931 NCL § 11571]

213.090 Pardon: Restoration of civil rights.

1. When a pardon is granted for any offense committed, the pardon may or may not include restoration of civil rights. If the pardon includes restoration of civil rights, it shall be so stated in the instrument or certificate of pardon; and when granted upon conditions, limitations or restrictions, they shall be fully set

forth in the instrument.

2. In any case where a convicted person has received a pardon without immediate restoration of his civil rights and has not been convicted of any offense greater than a traffic violation within 5 years after such pardon, he may apply to the state board of pardons commissioners for restoration of his civil rights and release from penalties and disabilities resulting from the offense or crime of which he was convicted. If, after investigation, the board determines that the applicant meets the requirements of this subsection, it shall restore him to his civil rights and release him from all penalties and disabilities resulting from the offense or crime of which he was convicted. If the board refuses to grant such restoration and release, the applicant may, after notice to the board, petition the district court in which the

conviction was obtained for an order directing the board to grant such restoration and release.

[Part 5:149:1933; 1931 NCL § 11573]--(NRS A 1973, 1845; 1977, 665)

Section 213.095 Notice by board to victim if clemency granted. If the board remits a fine or forfeiture, commutes a sentence or grants a pardon, it shall give written notice of its action to the victim of the person granted clemency, if the victim so requests in writing and provides his current address. If a current address is not provided, the board may not be held responsible if the notice is not received by the victim.

(Added to NRS by 1983, 1330)

Section 213.100 Order of discharge when clemency granted. Whenever clemency is granted by the board, there shall be served upon the director of the department of prisons or other officer

having the person in custody, an order to discharge him therefrom upon a day to be named in the order, upon the conditions, limitations or restrictions named therein.

[Part 5:149:1933; 1931 NCL § 11573]--(NRS A 1977, 870)

APPENDIX D

NEVADA REVISED STATUTES

Sections 175.552 - 175.562:

Section 175.552 Requirement; jury; panel of judges; evidence. Upon a finding that a defendant is guilty of murder of the first degree, the court shall conduct a separate penalty hearing to determine whether the defendant shall be sentenced to death or to life imprisonment with or without possibility of parole. The hearing shall be conducted in the trial court before the trial jury, or before a panel of three district judges if the trial was without a jury, as soon as practicable. In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible.

Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the constitution of the State of Nevada may be introduced. The state may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing.

(Added to NRS by 1977, 1543)

Section 175.554 Instructions to jury; determinations; findings and verdict.

1. If the penalty hearing is conducted before a jury, the court shall instruct the jury at the end of the hearing, and shall include in its instructions the aggravating circumstances alleged by the prosecution upon which evidence has been presented

during the trial or at the hearing. The court shall also instruct the jury as to the mitigating circumstances alleged by the defense upon which evidence has been presented during the trial or at the hearing.

2. The jury or the panel of judges shall determine:

(a) Whether an aggravating circumstance or circumstances are found to exist;

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether the defendant should be sentenced to life imprisonment or death.

The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances

sufficient to outweigh the aggravating circumstance or circumstances found.

3. When a jury or panel of judges imposes a sentence of death, the court shall enter its finding in the record, or the jury shall render a written verdict signed by the foreman. The finding or verdict shall designate the aggravating circumstance or circumstances which were found beyond a reasonable doubt, and shall state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

4. When a jury or a panel of judges imposes a sentence of life imprisonment, it shall specify whether the imprisonment is with or without possibility of parole.

(Added to NRS by 1977, 1543)

Section 175.556 Procedure when jury unable to reach unanimous verdict. If a

jury is unable to reach a unanimous verdict upon the sentence to be imposed, the supreme court shall appoint two district judges from judicial districts other than the district in which the plea is made, who shall with the district judge who conducted the trial, or his successor in office, conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly. A sentence of death may be given only by unanimous vote of the three judges, but any other sentence may be given by the vote of a majority.

(Added to NRS by 1977, 1543)

Section 175.558 Procedure when person convicted upon guilty plea or trial without jury. When any person is convicted of murder of the first degree upon a plea of guilty or a trial without a jury the supreme court shall appoint

two district judges from judicial districts other than the district in which the plea is made, who shall with the district judge before whom the plea is made, or his successor in office, conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly. A sentence of death may be given only by unanimous vote of the three judges, but any other sentence may be given by the vote of a majority.

(Added to NRS by 1977, 1544)

Section 175.562 Procedure when panel of judges unable to obtain concurrence of majority for sentence less than death.

If the concurrence of a majority cannot be had for any sentence less than death, the supreme court shall appoint a new panel of three district judges, none of whom was a member of the original panel,

or a succession of such new panels if required. The new panel may in its discretion either give sentence upon the record of the evidence heard before the original panel or supplement the record by recalling the former witnesses or calling new ones. If the panel calls new witnesses, the state and the defendant are each entitled to call new witnesses or offer other evidence relevant to the new testimony. The same vote is required for the giving of sentence by the new panel as by the original panel.

(Added to NRS by 1977, 1544)